BROKEN RECORDS: FEAR, PERFORMANCE, AND SURVEILLANCE IN THE EVOLUTION OF SEX OFFENDER REGISTRATION LAW

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ABSTRACT

Zachary I. Gorelick: Broken Records: Fear, Performance, and Surveillance in the Evolution of Sex Offender Registration Law
(Under the direction of Victoria Ekstrand)

This thesis chronologically examines U.S. sex offender registration law through three theoretical lenses - populist punitiveness, labeling, and performance – beginning during the period of Chinese Exclusion and ending in the present. Using qualitative legal and textual analysis research methods, this thesis explores the history of forced registration in the U.S., analyzes the federal and state requirements for sex offender registration and the legal challenges these have faced, considers areas where Fourth Amendment legal challenges may arise, and concludes by performing a textual analysis case study of the South Carolina sex offender registry. It concludes that a clear history of bigotry, political fear-mongering, and law enforcement performance continues to drive the expansion of registration schemes – with the federal government wielding the most influence in this process. The author suggests that state courts asserting their autonomy against increasingly punitive federal sex offender laws may be one path in the direction of meaningful reform.

To my wife, Hannah, who always encourages me to embrace challenging subjects.
Thank you for supporting me at every step.

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LIST OF ABBREVIATIONS

SBM	Satellite-based Monitoring
SCOTUS	Supreme Court of the United States
SLED	(South Carolina) State Law Enforcement Division
SMART	(Department of Justice Office of Sex Offender) Sentencing, Monitoring, Apprehending, Registering, and Tracking
SORN/SORNA	Sex Offender Registration and Notification Act (used interchangeably)

"Man is an onion made up of a hundred integuments, a texture made up of many threads."

— Hermann Hesse, *Steppenwolf: A Novel* (Eng. 1929).

CHAPTER ONE: INTRODUCTION & BACKGROUND

Introduction

Why Sex Offenders? The decision to research the rights (and violation of those rights) of sex offenders and the litany of hoops through which those convicted of sex offenses must jump, sparks a litany of questions from friends and family. Primarily, they'll ask why – when there are so many pressing issues facing innocent, marginalized people – should scholars worry about the civil rights of those convicted of sex crimes? Sex offenders are 'monsters,' they may say. 'The worst of the worst' is a common refrain. Certainly, there are standout cases of vicious cruelty that come to mind when one conjures up the image of a sex offender. Scholars have generally agreed that the term is associated with depictions of "the 'predatory sex offender' and the 'anonymous stranger' who abducts, rapes and kills women and children [and] renders all convicted sexual offenders as 'outcasts.'"[1] People react strongly, in part, because sex offenders "and in particular child abusers, are repeatedly represented as the 'bogeyman of our age.'"[2] This reaction, and the 'moral panic' it produces, "creates an environment in which issues of justice such as due process, proportionality, and privacy are

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[1] KIRSTY HUDSON, *Sex offenders' identities and identity management, in* SEX OFFENDERS: PUNISH, HELP, CHANGE OR CONTROL?: THEORY, POLICY AND PRACTICE EXPLORED 71–89, 71 (Jo Brayford et al. eds., 2012).

[2] *Id.* at 72.

eschewed."[3] It is precisely this reaction that makes a vigorous defense of the rights of sex offenders so very important.

In many ways, the treatment of 'the worst of the worst' (or at least those labeled as such) in our society exposes some of the cruelty in our legal system. If one wants to see the areas wherein the government takes off the kid gloves and blurs the line between safety and cruelty – where it stretches the bounds of constitutionality (sometimes to the point of breaking) – one should look to the margins of society, in places where the light doesn't shine and at people for whom the public holds little compassion. "Prisoners are the canary in the coal mine," says David Fathi, director of the American Civil Liberties Union's national prison project.[4] "When you look at how the government treats prisoners, you see what unchecked, arbitrary government power looks like. And it's not pretty."[5] While examples of this performative "populist punitiveness"[6] abound, consider that in the same week that Charleston shooter Dylann Roof – later convicted of slaying nine people – was being held on $1 million bond, "a San Diego judge set bail for a man accused of taking pictures of preschoolers with their shirts off at $3 million."[7]

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[3] Mary Maguire & J.K. Singer, *A False Sense of Security: Moral Panic Driven Sex Offender Legislation,* 19 CRITICAL CRIMINOLOGY 301–312 (2011).

[4] CJ Ciaramella, *Prisons Are the Hardest Places to Read About Mass Incarceration,* REASON, September 27, 2019, https://reason.com/2019/09/27/prisons-are-the-hardest-places-to-read-about-mass-incarceration/.

[5] *Id.; see also* Josh Farley, *The 'Registry' Phenomenon: How Far Should it Go?*, THE KITSAP SUN, February 23, 2011, http://pugetsoundblogs.com/kitsap-crime/2011/02/23/the-registry-phenomenon-how-far-should-it-go/ (citing Ohio State University Professor Douglas Berman stating that sex offenders are the canary in the coal mine with regard to forced registration).

[6] Anthony Bottoms, THE POLITICS AND PHILOSOPHY OF SENTENCING, IN THE POLITICS OF SENTENCING REFORM 17–49 (Chris Clarkson & Rod Morgan eds., 1995).

[7] Judith Levine, *Same-Sex Marriage Is Not Sexual Liberation,* BOSTON REVIEW, June 30, 2015, http://bostonreview.net/blog/judith-levine-same-sex-marriage-sexual-liberation.

One rather unique aspect of our treatment of sex offenders is in our online, public sex offender registries. In the mid-1990s, the United States began down a path of publicly naming and shaming those in our community who had committed sex offenses, a performance of values that prioritized messaging over efficacy. The expansion of sex offender registries would ultimately lead to satellite tracking and significant privacy loss for nearly a million Americans.

Under a federal mandate, states are required to maintain these registries and include certain information – but these minimum requirements don't indicate any boundaries beyond those enshrined in the Constitution. Whereas the federal mandate "establishes a national baseline"[8] for these programs, the official guidance from the Department of Justice unequivocally states that the Act "generally constitutes a set of *minimum* national standards and sets a floor, not a ceiling, for jurisdictions' programs."[9] States, as the guidance outlines, are given a broad spectrum of ways to publish these registries and create their own related laws.[10] Beyond two exceptions – requiring that states exclude victim identifying information and registrants' Social Security numbers[11] – "jurisdictions' discretion to go further than the [mandated] minimum is not limited."[12]

The Hypothetical. In practice, the requirements of the registry and surrounding law often present a stark contrast even between sex offenders and similarly-classified felons.

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[8] National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38045 (Jul. 2, 2008), *available at* https://www.federalregister.gov/documents/2008/07/02/E8-14656/office-of-the-attorney-general-the-national-guidelines-for-sex-offender-registration-and.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

Consider a hypothetical pair of 18-year-old North Carolina residents: Abe and Barry. Neither Abe nor Barry has a criminal record.

Abe is a city bus driver who is addicted to pornography and struggles with mental health issues. Abe downloads copious amounts of freely-available pornography to his personal hard drive. Some of this pornography features minors. Abe keeps all of the pornography on his laptop and does not share it or distribute it further.

One day, both Abe and Barry are sitting in a local coffee shop. Barry, who knows that Abe keeps expensive computer equipment in his backpack, waits until Abe is in the restroom, picks up Abe's unattended backpack, and walks out. The contents of the backpack are worth approximately four thousand dollars. Abe returns, realizes that his backpack has been stolen, and files a police report.

Police use GPS tracking in the laptop to track it down – promptly arresting Barry and charging him with larceny, a Class H felony.[13] The police open the laptop to verify that they have the right device – only to find the child pornography open on the screen. Abe is then charged with third degree exploitation of a minor (possession of child pornography), also a Class H felony.[14]

Both plead guilty and are given relatively light sentences – between four and six months of either probation, community service, or incarceration (or some combination of the three) – and both finish their respective sentences within the year. At this point, however, their paths take very different turns.

[13] N.C. GEN. STAT. ANN. § 14-72 (West 2012).

[14] N.C. GEN. STAT. ANN. § 14-190.17A (West 2008).

Barry now has a felony record. Under the newly-enacted Second Chance Act, Barry fits the criteria for expunction eligibility.[15] He can file a petition for expunction and, if it is granted (which is likely, given his lack of a prior record), it may be possible for Barry to completely wipe the slate clean and have his conviction sealed (viewable only by prosecutors in the future, not visible in public records).[16] There are multiple campaigns on both the state and national levels to create criminal justice reform that increasingly provides opportunities to those with convictions.[17] If Barry cannot, however, have his conviction cleared, he may not be able to own a firearm.[18] Barry will also face social barriers in terms of finding work and in building personal relationships due to his conviction.[19]

Abe, though, has a long road ahead. Abe is required to register as a sex offender in North Carolina for a minimum of 30 years. While registration is generally a ten-year minimum, Abe's conviction for downloading the child pornography is considered a "sexually

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[15] N.C. GEN. STAT. ANN. § 15A-145.8 (West 2019).

[16] *Id.*

[17] *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds,* ACLU (Nov. 16, 2017), https://www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds (finding a general consensus in favor of criminal justice reform across party lines); *see generally* Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill,* N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html; *see also* Sarah Y. Sheppeard, *Criminal Justice Reform: The Time Has Come*, 56 TENN. B.J. 3 (Feb. 2020) ("If the ACLU, the Koch brothers and the Beacon Center are all supporting it, it needs to happen").

[18] N.C. GEN. STAT. ANN. § 14-415.1 (West 2011), *invalidated in part by* Johnston v. State, 224 N.C. App. 282, 735 S.E.2d. 859 (2012) (holding that a criminal statute barring a felon from owning a firearm in his home was in violation of the Second Amendment).

[19] *See generally* Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003); Jeremy Travis, Amy Solomon & Michelle Waul, JUSTICE POLICY CENTER, THE URBAN INSTITUTE, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* (2001), *available at* http://www.urban.org/pdfs/from_prison_to_home.pdf; Jeremy Travis, *But They all Come Back: Rethinking Prisoner Reentry*, 7 SENT'G AND CORRECTION, ISSUES FOR THE 21ST CENTURY, no. 7, May 2000 (National Institute of Justice).

violent offense," which triples the registration period.[20] As part of his registration, he must provide his full name, address, birthday, identifying traits (eye color, hair color, race, height, weight, sex, and scars, marks or tattoos), any aliases, and his conviction information (which will display as "SEX EXPLOIT MINOR 3RD DEGREE" with no elaboration).[21] He will have three mugshots –from different angles – taken by his local sheriff.[22] When the sheriff feels that these are no longer accurate depictions, Abe will be required to come back in and take new mugshots.[23] All of this information will be posted on the public-facing sex offender registry, through which the public can search and find Abe's profile by address proximity, latitude and longitude, or using individual identifiers (such as Abe's name, which he is now banned from changing).[24]

If he fails to register or respond to an official request to update his registration, he is guilty of a Class F felony.[25] His apartment building is across the street from an elementary school, and so he must now move elsewhere – he is not allowed to live within 1,000 feet of a school or child-care center.[26] When he moves, he is required to notify the sheriff of his change of address – failure to do so is also a Class F felony.[27] Members of the public can sign up for telephone or email notifications when a sex offender moves into their area, so his new

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[20] N.C. GEN. STAT. ANN. § 14-208.7 (West 2014).

[21] N.C. SBI, NORTH CAROLINA SEX OFFENDER AND PUBLIC PROTECTION REGISTRY, https://sexoffender.ncsbi.gov/search.aspx.

[22] N.C. GEN. STAT. ANN. § 14-208.9A(a)(3a) (West 2014).

[23] *Id.;* N.C. GEN. STAT. ANN. § 14-208.9A(c) (West 2014).

[24] N.C. SBI *supra* note 21; N.C. GEN. STAT. ANN. § 14-202.6 (West 2008).

[25] N.C. GEN. STAT. ANN. § 14-208.11 (West 2013).

[26] N.C. GEN. STAT. ANN. § 14-208.16 (West 2019).

[27] N.C. GEN. STAT. ANN. § 14-208.9 (West 2014).

neighbors may have knowledge of his criminal history before he's even met them.[28] He is also out of a job, as sex offenders in North Carolina are not allowed to carry the commercial license required for passenger vehicles.[29] For the next thirty years, Abe is potentially banned from being within 300 feet of "any place where minors frequent," such as libraries, arcades, amusement parks, recreation parks, swimming pools, and the State Fair, though this law has been successfully challenged and stands in a state of legal limbo.[30]

Roadmap. This thesis examines how states implement their respective sex offender registries, how much of this is guided by federal law, state law, and judicial decisions, and what Fourth Amendment issues might be at play – both now and in the future. Chapter One of this thesis continues with a history of forced registration in the United States, which attempts to show the connections between the bigotry and fear-based legislation of the past and the modern registry. It then provides a complete legislative history of the modern federal mandate, which is necessary as this federal mandate – while complex – is the bedrock upon which all state-level registry law rests. A brief note on efficacy is included, for reference. After this, the work synthesizes previous literature on this issue and shows where gaps in scholarship exist. Chapter One concludes with the research questions addressed by this thesis.

Chapter Two first describes the methodology and limitations of the study. This chapter then describes the theories upon which this research rests. The work dives into the

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[28] N.C. SBI *supra* note 21.

[29] N.C. GEN. STAT. ANN. § 14-208.19A (West 2009).

[30] N.C. GEN. STAT. ANN. § 14-208.18 (West 2016), *invalidated by* Doe v. Cooper, 842 F.3d 833 (4th Cir. 2016) (holding that the language of the statute was vague and in violation of due process, and while the 300 ft restriction was a content neutral speech restriction under the First Amendment, it was still overbroad in violation of the First Amendment).

handful of primary theories that, as the author will suggest, drive the continued use of sex offender registries in the United States. The first theory is populist punitiveness, also known as punitive populism (with these terms being used interchangeably in the literature). The second is labelling theory, which looks at the impacts that labelling an individual or group has on the outcomes these entities experience. The third is performance theory, applied in the context of the government's use of the registry to perform for the taxpayer. The registry, in this regard, is used to show the public that the police and politicians are doing their job by creating an online display of the various perceived social threats they have supposedly neutralized.

Chapters Three, Four, Five, and Six each address a research question, while Chapter Seven discusses the findings as a whole and concludes the thesis.

A History of Forced Registration in the United States

Bigotry and Fear. Although many of the significant scholarly backgrounds on sex offender registries in the United States begin in the early 1990s, when major legislation created a massive wave of policy shifts, the nation has a long history of forced registration.

This section will draw a clear line between the bigoted roots of human registration in the United States and the current system, as well as providing a comprehensive background on the foundational federal mandate that serves as the framework for statewide registries today. It should be noted that Japanese internment won't be used in this history, primarily because the registration of Japanese individuals was a by-product of internment and relocation, rather than a tool to enact it.

Forced registration in the U.S. traces back to Chinese exclusion under the Geary Act of 1892.[31] The Geary Act, an extension to the law largely prohibiting Chinese immigration into the United States, added a new requirement that any "Chinese person or person of Chinese descent" legally permitted to stay in the United States must apply for "a certificate of residence" that included "the name, age, local residence and occupation of the applicant."[32] Any person of Chinese descent (the Act uses the slur "Chinaman" numerous times) found without documentation was subject to deportation unless "by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate," proof of which required "at least one credible white witness."[33] The Act is significant for "requiring registration of immigrants for the first time."[34] This registration expanded. "The expansion of raids to European immigrant communities in New York City and beyond reflects the fact that, by the late 1920s, the regime of photographic identity documentation that had underpinned the interior enforcement of Chinese exclusion had been expanded to cover all immigrants, as well as naturalized citizens."[35] "The expansion of documentation and registration," writes Anna Pegler-Gordon, "was closely linked to the expansion of deportation during the 1920s."[36] Chinese registration additionally "led to widespread corruption among inspectors."[37] Quite startlingly, Chinese photographic registration cards

[31] Geary Act (27 Stat. 25), sec. 7, and McCreary Amendment (28 Stat. 7), sec. 2.

[32] *Id.*

[33] *Id.*

[34] ANNA PEGLER-GORDON, IN SIGHT OF AMERICA: PHOTOGRAPHY AND THE DEVELOPMENT OF U.S. IMMIGRATION POLICY 6 (2009).

[35] *Id.* at 222.

[36] *Id.* at 223.

[37] *Id.* at 225.

appear to be "the first [instance of] government-issued photographic identification in the United States."[38] The Geary Act was repealed in part in 1943, when the Magnuson Act provided for Chinese immigration – though the Magnuson Act still prohibited Chinese property ownership.[39] The Magnuson Act was not fully repealed until 1965.[40]

Anti-gangster laws in Los Angeles County in the early 1930s were the next instance of forced registration in the United States, drawing on the Geary Act's now-established tradition of registering those perceived as undesirable. Los Angeles County (and, in parallel proximity, the City of Los Angeles) enacted emergency statutes providing for the registration of all convicted felons.[41] Santa Monica enacted a similar law requiring convict registration in response to L.A. County's law. In the Los Angeles Times, a report noted that a unanimous vote by the Santa Monica City Council, "gives ex-convicts residing here just forty-eight hours from today's publication of the measure in which to register at police headquarters. Failure to register within the prescribed time carries a penalty for each separate day's delay, of a fine not to exceed $500 and a jail sentence of not more than six months, or both."[42] The City of L.A. registry then expanded to included sex offenses shortly thereafter. In 1940, the City passed Ordinance 83351, which added sex offenses to the list of registerable convictions. It's important to note that the inclusion of sex crimes in the earliest registration schemes is believed to have been used solely to target homosexual conduct in the 1950s, as

[38] *Id.* at 13.

[39] Magnuson Act (57 Stat. 600), sec. 1.

[40] *See* Elaine Low, *An Unnoticed Struggle*, JAPANESE AMERICAN CITIZENS LEAGUE (2008).

[41] L.A. County, Cal., Ordinance 2339 (Sep. 11, 1933) (requiring all convicts with either in-state or out-of-state felony convictions register with the county Sheriff within 24 hours of arrival); City of Los Angeles, Cal., Ordinance 73,013 (Sep. 12, 1933) (a city-wide ordinance parallel to Ordinance 2339).

[42] *FELON LAW PASSED BY BEACH CITY*, LA. Times, Oct. 18, 1933, at 10.

newly-registerable convictions included "sex perversions," "crimes against nature," and "lewd vagrancy."[43] Police Chief Arthur C. Hohmann "spoke favorably" to the Los Angeles Times in 1940 about requiring "registration of sex offenders and degenerates of all types."[44] In the year following sex crime's inclusion in the Los Angeles County registry, over ninety percent of all sex crime registrations were for consensual homosexual contact.[45] Soon, the registry expanded to become a statewide structure[46] and quickly began to spread through the states.[47]

It should be noted that tracking 'undesirable' or otherwise ostracized communities has often come from a motivation to restrict, segregate, or 'otherize' these groups. Finger-printing, for example, generally seen as a separation between individuals and their socially constructed groups, were originally pioneered by proponents of eugenics, such as Francis Galton, who believed that fingerprinting was a way to record and thereby track individuals of varying races.[48] When Galton wrote that fingerprints were "the most important of anthropological data," he implied that fingerprinting would be the "key to unlocking the code

[43] Ordinance 2339, *supra* note 41.

[44] *Fingerprint Plan Before Board*, L.A. Times, April 17, 1940, at A1.

[45] LAPD Ann. Rep. 28-29 (1950).

[46] Associated Press, *Sex Bill Passed*, LA TIMES, June 20, 1947.

[47] WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003 (2008).

[48] Simon A. Cole, *Twins, Twain, Galton, and Gilman: Fingerprinting, Individualization, Brotherhood, and Race in Pudd'nhead Wilson*, 15 CONFIGURATIONS 227-65 (2007).

of heredity."[49] In his novella *Pudd'nhead Wilson*, Mark Twain similarly weaves fingerprints and race together as a central plot point.[50] [51]

As the next portion of this chapter will discuss, the origins of registries would become a wide-ranging set of surveillance systems that far surpassed the scope of these early registries.

Modern Expansion. Beginning in the late 1970s, after the abduction and murder of six-year-old Etan Patz, concerns about 'stranger danger' – child abductions, milk-carton kids, etc. – took hold in the United States. During "a moment of unrest and uncertainty," Paul Renfro describes, amid the racial backdrop of 'post-civil rights' eras, kindled by a homophobic climate and the growing culture war in America, children became the symbol of national innocence – and preventing their potential harm became a national performance in fighting for that innocence.[52] In the early 1990s, sex offender registries would take center stage. Jacob Wetterling, an eleven-year-old boy, was kidnapped and killed on October 22, 1989.[53] Almost thirty years later, Danny Heinrich admitted to kidnapping, sexually

[49] *Id*.

[50] *Id*.

[51] Note: for the interested reader hoping to look to earlier history, there are some fascinating studies that go back to the fifteenth and sixteenth centuries and examine the criminalization of Egyptian identity in English law (used as a catch-all phrase for those of Arabic ancestry) – but these and similar studies don't get to the heart of the 'list-making' aspect required for this work; *see generally* John Morgan, *'Counterfeit Egyptians': The construction and implementation of a criminal identity in early modern England*, 26 ROMANI STUDIES 105-128 (2016).

[52] PAUL M. RENFRO, STRANGER DANGER: FAMILY VALUES, CHILDHOOD, AND THE AMERICAN CARCERAL STATE (2020).

[53] Amy Forliti & Steve Karnowski, P*Minnesota man confesses to killing of Jacob Wetterling*, ASSOCIATED PRESS, September 6, 2016, https://apnews.com/1cbb965d61f143a08c4c224220b9be43.

assaulting, and murdering Jacob.[54] Heinrich also admitted to sexually assaulting another victim around the same time period.[55] Jacob's parents, meanwhile, successfully lobbied Congress to enact the federal Jacob Wetterling Act. This act consisted of a series of laws instituting sex offender registries, which required anyone convicted of a criminal offense against a minor to register their current address with law enforcement officials after being released from the criminal justice system.[56] Soon after, the Wetterling Act would become the catalyst for a seismic shift in public policy: Megan's Law.

Following the rape and murder of Megan Kanka, a seven-year-old from New Jersey,[57] the intense media focus led to additions to the Wetterling Act that effectively swallowed up the original act in both size and scope. This new provision, now known as Megan's Law, required state compliance with the registration requirements as listed in the Wetterling Act. No longer an encouragement, Megan's Law turned the Wetterling Act into a state-by-state requirement. Most notably, Megan's Law made community notification mandatory – requiring "the release of relevant information to protect the public from sexually violent offenders."[58] For the first time, sex offenders were no longer simply required to report their whereabouts to local law enforcement, but they were now reporting to the public itself.

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[54] Esme Murphy, *Jared Scheierl Awarded Over $17M In Civil Suit Against Danny Heinrich*, CBS MINNESOTA, November 29, 2018, https://minnesota.cbslocal.com/2018/11/29/jared-scheierl-civil-suit-danny-heinrich-jacob-wetterling/.

[55] *Id.*

[56] The Jacob Wetterling Investigation: Timeline of Events, AMERICAN PUBLIC MEDIA: REPORTS (2016); Jack B Brooks, *H.R.3355 - 103rd Congress (1993-1994): Violent Crime Control and Law Enforcement Act of 1994* (1994), https://www.congress.gov/bill/103rd-congress/house-bill/3355/text; UNITED STATES CONGRESS, *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act* (1994).

[57] William Glaberson, *Man at Heart of Megan's Law Convicted of Her Grisly Murder*, THE NEW YORK TIMES, May, 1997.

[58] UNITED STATES CONGRESS, *Megan's Law* (1996).

In 1996, Pam Lychner, a victims' rights advocate who had narrowly escaped an attempted abduction years prior, was killed in a plane crash. In response to Lychner's death, Congress created the Pam Lychner Act, which consolidated the patchwork of state-wide registries and took the project federal, adding new requirements for states to submit their information to a national database of sex offenders maintained by the FBI.[59] Minor acts continued in the following years, refining and slowly expanding the scope of the new national system.[60]

Modernizing further in 2003, the PROTECT Act mandated that all states have a dedicated website for searching their respective sex offender registries.[61] By 2003, "all 50 states had created online registries by which the public could easily obtain information about sex offenders living in their communities."[62]

Shocking crimes against children attracted media attention and were often the catalysts for stricter laws regarding sex offenses. In 2006, the media returned focus to the abduction of six-year-old Adam Walsh, who had been kidnapped and murdered in 1981.[63] Adam's parents, who had long been pushing for reforms to the law, stood on the South Lawn

[59] UNITED STATES CONGRESS, *Pam Lychner Sexual Offender Tracking and Identification Act of 1996* (1996).

[60] Department of Justice, *Legislative History of Federal Sex Offender Registration and Notification* (2020), https://smart.ojp.gov/sorna-archived/legislative-history-federal-sex-offender-registration-and-notification.

[61] UNITED STATES CONGRESS, *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003* (2003).

[62] Kristen M Zgoba et al., *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems.*, 28 SEX. ABUSE 722–740, 723 (2016).

[63] Olivia B. Waxman, *Adam Walsh Murder: The Missing Child Who Changed America | Time*, TIME MAGAZINE, August 10, 2016.

of the White House – twenty-five years after their son's murder – as President George W. Bush signed the Adam Walsh Child Protection and Safety Act into law.[64]

The Walsh Act largely replaced the Wetterling Act and standardized Sex Offender Registration and Notification (SORN) requirements across the states.[65] Known as SORN or SORNA (to include the word 'Act'), the new law massively expanded the breadth of sex registries in the United States. Severity of punishment was increased across the board, new offenses – including non-sexual offenses – were added, mandatory minimums and statutes of limitations were increased, offenders were subject to more random searches, and post-conviction civil commitment schemes were enacted, primarily in the form of GPS tracking programs.[66] And, for the first time in this series of legislation, the bill had teeth: a state's failure to comply with the new regulations risked serious financial assistance from the federal government.[67] Since the passage of the Walsh Act, some new legislation has been passed to adapt the laws to the digital age – such as requiring sex offenders to provide law enforcement with their online identifiers and levying a one-time fine (irrespective of other penalties) of $5,000 for every human trafficking conviction.

Generally, with each new bill in this space, the insistence on more information and less privacy for offenders has continued.[68] As this legislative history suggests, the foundation

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[64] Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?*, 21 CRIM. JUSTICE POLICY REV. 31–49, 32 (2010); UNITED STATES CONGRESS, *Adam Walsh Child Protection and Safety Act of 2006* (2006).

[65] Zgoba et al., *supra* note 62 at 723.

[66] Eric M. Dante, *Tracking the Constitution: The Proliferation and Legalization of Sex-Offender GPS-Tracking* Statutes, 42 SETON HALL L. REV. 1169, 1191 (2012) ("The statute authorized $5,000,000 in grants and gave a major financial incentive for each state to pass a sex-offender tracking statute").

[67] UNITED STATES CONGRESS, *supra* note 61.

[68] UNITED STATES CONGRESS, *Keeping the Internet Devoid of Sexual Predators Act of 2008* (2008); UNITED STATES CONGRESS, *Justice for Victims of Trafficking Act of 2015* (2015).

of registry law can be characterized as an ever-broadening series of requirements and restrictions.

Efficacy. It is worth noting here that recidivism rates of sex offenders have been "extensively reviewed in the literature" and said research "has indicated that not all sex offenders pose the same risk to communities, as some types of offenders are more likely to reoffend than others."[69] In fact, "recidivism rates among convicted sex offenders are generally low compared with those of other offenders, even accounting for the potential for under-reporting or low detection rates."[70] Additionally, most research has found "no significant reduction in recidivism due to community notification" – i.e. registries.[71]

The next portion of this chapter will outline the state of literature on this topic, in order to suggest which gaps in the scholarship merit additional research.

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[69] Freeman, *supra* note 64.

[70] Sarah Napier et al., *What impact do public sex offender registries have on community safety?*, 550 TRENDS ISSUES CRIME CRIM. JUSTICE 2 (2018); *see also* James Vess et al., *International sex offender registration laws: research and evaluation issues based on a review of current scientific literature*, 15 POLICE PRACT. RES. 322–335, 329 (2014) ("sex offenders have been reported as having one of the lowest offense-specific reoffense rates (sex offenders committing new sexual offenses) in comparison to other types of offenders (e.g. robbers committing new robberies)"); *see also* R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULT. CLIN. PSYCHOL. 1154–1163 (2005). (noting that only one in seven sex offenders will reoffend).

[71] Jill S Levenson, David A. D'Amora & Andrea L Hern, *Megan's law and its impact on community re-entry for sex offenders*, 25 BEHAV. SCI. LAW 587–602, 588 (2007); *see also* Ray Pawson, *Does Megan's Law work? A theory-driven systematic review*, 8 ESRC UK CENTRE FOR EVIDENCE BASED POLICY AND PRACTICE (2002) (citing Donna D. Schram & Cheryl Darling Milloy, *Community notification: A study of offender characteristics and recidivism*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY (1995)) (finding that recidivism rates between two matched groups of sex offenders during both the four years before and four years after the passage of Megan's Law showed no significant change); *see also* Elizabeth Drake & Steven Aos, *Does sex offender registration and notification reduce crime? A systematic review of the research literature*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY (2009) (finding no significant effect on sexual recidivism among convicted sex offenders as a result of SORN-related registries); *see also* Jill Levenson et al., *Failure to Register as a Sex Offender: Is it Associated with Recidivism?*, 27 JUSTICE Q. 305–331 (2010) (finding no difference in sex offence recidivism between those registered and those not registered).

Literature Review

Registry Websites. Few researchers have examined the content of registry websites. The handful of studies in existence, however, is useful in establishing where the gaps in the literature might be.

In 2002, D.B. Adams studied the administrative aspects of sex offender registry publication but did not substantially examine the content of the pages themselves.[72] In 2005, Richard Tewksbury and G.E. Higgins looked at the content of the 40 state registries in existence at the time, looking to compare the information listed between states and regions.[73] Most common were photographs, addresses, and identifying physical features such as height, weight, hair color, and eye color. Additionally, the authors found that most states included conviction offenses, levels of risk, assumed names or aliases, offenders' employers, profile of victims, vehicle descriptions, and most recent change in registry jurisdiction.[74] It's important to note, however, that this study was conducted prior to the passage of the Adam Walsh Act. Now, for example, every state is federally mandated to include a photograph of the offender, whereas this was not the case during Tewksbury and Higgins' study.[75]

While not directly related to the content of the registries, Christina Mancini et al. studied the variations of sex crime laws – including registry requirements as a subsection – across the U.S. in 2011.[76] The authors did not dive into the content of the registries but

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[72] D.B. Adams, *Summary of state sex offender registries, 2001.* Washington, DC: U.S. Department of Justice.

[73] Richard Tewksbury & G.E. Higgins, *What can be learned from an online sex offender registry site?* 14 J. COMMUNITY CORRECT. 15–16 (2005).

[74] *Id.*

[75] *Id.*

[76] Christina Mancini, J. C. Barnes & Daniel P. Mears, *It Varies From State to State*, 24 CRIM. JUSTICE POLICY REV. 166–198 (2013).

examined the ranges in lengths of time required for registration. The authors found a very broad range of registration periods between states with eleven requiring lifetime registration with no distinction between offender types or offenses.[77] The authors found that some states also went beyond registries in terms of community notification, issuing flyers, holding community meetings, sending out e-mails, and even calling neighbors to inform them that a sex offender was now residing nearby.[78]

In 2012, Mary Brewster et al. conducted an analysis of the publicly accessible content of 51 sex offender registries (those of all 50 states and the District of Columbia).[79] The study examined the content of the registries and identified the prevalence of certain types of data and along with the prevalence of search features. The authors note that "the sites varied greatly from state to state and many offered additional features not required [by federal law]."[80] It should be noted that the purpose of this study was not to perform a systematic content analysis, but to describe the presence or absence of various features or information and, most notably, to determine if the content adequately fulfilled the Walsh Act mandates.[81]

In 2015, Robert Lytle conducted an analysis of how sex offender registration and community notification varied between five Midwestern states and determined that states varied in their labelling of 'dangerous,' their use of data disclosure, and their time between

[77] *Id.* at 176.

[78] *Id*.

[79] Mary P. Brewster, Philip A. DeLong & Joseph T. Moloney, *Sex Offender Registries*, 24 Crim. Justice Policy Rev. 695–715 (2013).

[80] *Id.*

[81] *Id.*

legislative revisions.[82] It is very instructive in its methodology and Lytle's ability to tie the timing of legislation to public opinion and the resulting changes in the physical appearance of the registry will be incredibly useful in the textual analysis required of this study.[83]

In 2019, Bradley Custer specifically looked at how many states published higher education status information on their respective sex offender websites.[84] Custer found that nearly half of states have some such requirement and Custer analyzed these laws to try to find a pattern among them, concluding that the laws were the result of in-state political pressures more than they were reflections of suggested efficacy.

The Concept of Registries. There has been very little research of sex offender registries from a textual analysis perspective. Ruth Simpson alludes to the framework of sex offender registries by supposing a neutral framework at play in which one "assumes a neutral background (good and/or bad) and marks items as safe or dangerous."[85] Joseph Ferrandino expands on this idea, noting that the sex offender registry acts in such a way: "Being on the sex offender registry marks one as bad, and not being listed means one has not been caught and thus is potentially good."[86] One way this system reduces social judgement to a binary good or bad is the vague level of information provided on the crimes themselves. "Offering scant information on the offenders and their crimes," Ferrandino says, "but putting pictures

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[82] *Variation in Criminal Justice Policy-Making*, 26 CRIM. JUSTICE POLICY REV. 211–233 (2015).

[83] *Id.*

[84] Bradley D. Custer, *Variations in State Sex Offender Statutes: Implications for U.S. Higher Education*, 30 CRIM. JUST. POL'Y REV. 906-924, 906 (2019).

[85] Ruth Simpson, *Neither clear nor present: The social construction of safety and danger*, 11 SOCIOL. FORUM 549–562 (1996).

[86] Joseph Ferrandino, *Beyond the Perception and the Obvious: What Sex Offender Registries Really Tell Us and Why*, 27 SOC. WORK PUBLIC HEALTH 392–407 (2012).

and locations on the website for the world to see is one way of providing a level of dangerousness within society while hiding the true social reality of how the offender came to be on the list."[87] Elizabeth Mustaine, et al. note that sex offender registries further the belief in society that "sex offenders may be likely to target those in their immediate vicinity with whom they have frequent contacts," which may or may not reflect the reality.[88]

On the idea of government forms and databases, Lisa Gitelman writes that "[b]lank forms work on their face to rationalize work, but they are also one small part of the way that bureaucracy assumes an objective character."[89] Gitelman explains that because "blank forms help routinize, they dehumanize" and remove all affect from the relationship between the actor filling in the form and the actor collecting the form. While an individual working to obtain information might identify on an empathetic level with the subject, the blank form – filled in by the subject and returned – "merely objectifies" the subject.[90] Gitelman notes that even blank forms that "have to do with identity do not entail identification."[91] In short, Gitelman describes a relationship in which subjects must conform their identity to the options provided – to check a box or a legal category, for example – in lieu of providing an answer that best describes their reality and provides context to future readers of these documents.[92]

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[87] *Id.* at 394.

[88] Elizabeth E. Mustaine, Richard Tewksbury & Kenneth M. Stengel, *Residential location and mobility of registered sex offenders*, 30 AM. J. CRIM. JUSTICE 177–193 (2006).

[89] LISA GITELMAN, PAPER KNOWLEDGE: TOWARD A MEDIA HISTORY OF DOCUMENTS 31 (2014).

[90] *Id*.

[91] *Id*.

[92] *Id*. at 31-32.

In all, Ferrandino makes a strong argument for viewing the registry through the lens of a policy that should be approached from a socially realistic theory, but is, in practice, operated under a social constructionist paradigm.[93] Ferrandino's work is also important because it represents the only textual analysis of sex offender registries themselves (not outcomes, perceptions, etc.) to be located. There is intriguing additional literature on the use of criminal imagery and labeling within the world of sex offense law, but much of it focuses on non-registry activity, such as GPS monitoring ankle bracelets, etc., which is not specific to the questions this work will address.[94]

Purpose

The purpose of this thesis is to examine the metaphorical 'life cycle' of sex offender registries as a way to understand the similarities and differences across states and how the disparities may constitute Fourth Amendment (or other Constitutional) violations. This 'life cycle' will begin with the federal mandates. The study will analyze how the federal mandates impact the statewide laws and how judicial decisions at both levels further impact the resulting implementation – the registries themselves. Thus, this study will attempt to show both how and why states vary in their treatment of registered sex offenders in both legislation and action by analyzing the registries at each stage and attempting to understand these complicated relationships. Finally, this study will take a broader view and consider how the landscape of the resulting registries squares with the Fourth Amendment privacy rights enshrined in the constitution. Building on this analysis, the work will also use a case study of

[93] Ferrandino, *supra* note 86 at 397.

[94] Lauren Kilgour, *The ethics of aesthetics: Stigma, information, and the politics of electronic ankle monitor design*, 36 INF. SOC. 131–146 (2020).

one state's sex offender registry to show how the preceding factors and theories intertwine to create the consumer-facing product that is – to the public – 'the sex offender registry.'

Research Questions. This thesis will address the following research questions:

(1) What do the federal and parallel state statutes for sex offender registries require and why?

(2) How have the courts interpreted these statues?

(3) Are there existing or potential Fourth Amendment issues in this body of law?

(4) How does a case study of one state's sex offender registry demonstrate the performative aspects of sex offender registries?

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CHAPTER TWO: METHOD & THEORY

Methodology

Legal Research and Analysis. In order to identify the relevant statutes, cases, legislative history, and public guidance used in this thesis, the author referenced an array of secondary sources. The research began with the author reading the relevant portions of secondary sources and legal treatises which summarized the issue in a comprehensive way, such as Daniel Patrick Moylan's overview of the federal legislative history in the *Georgetown Journal of Gender and the Law*,[95] Catherine Carpenter and Amy Beverlin's summary of constitutional challenges to registry laws in *Hastings Law Journal*,[96] and the *American Law Reports* chapters on the validity of state community notification statutes.[97] In addition, Thomson Reuters provides a 50 State Statutory Survey of sex offender registration laws through Westlaw, upon which the author relied heavily to find state statutes and their associated cases.

In most instances, research was furthered by following chains of citations from within secondary sources, using the 'Citing References' tab in Westlaw. Extensive searching was

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[95] Daniel Patrick Moylan, *Megan's Laws: Community Registration and Notification Laws for Sex Offenders*, 1 GEO. J. GENDER & L. 727 (2000).

[96] Catherine L. Carpenter and Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071 (2012).

[97] Carol Schultz Vento, Annotation, *Validity, construction, and application of state statutes authorizing community notification of release of convicted sex offender*, 78 A.L.R. 5th. 489 (Originally published in 2000); *see also* David Faigman et al, Annotated, *Community registration and notification statutes—Constitutional challenges—The federal Sex Offender Registration and Notification Act ("SORNA")*, 2 MOD. SCI. EVIDENCE § 10:21 (2020-2021 Edition) (providing further/current case law).

performed on Westlaw, using various search terms such as “sex offender registries,” “sex offender law,” “sex offender tracking,” “adam walsh,” “pam lychner,” “criminal registr*,” “ex post facto,” “fourth amendment,” “SORN*,” “state sex offender,” “registry law,” and combinations thereof. Boolean operators, such as asterisks, conjunctions, and exclusionary hyphens, were used to refine searches within Westlaw. Regarding SORNA, the original law has been transferred and has different citations than originally noted in most previous scholarship. This work has attempted to only include the most current, effective citations to the law as it stands today. This may cause some inconsistency between the secondary sources cited and this work but should not have any impact on the substance of this thesis.

Research Questions One, Two, and Three were addressed using traditional case and statutory analysis to study the combination of case law and statutes that are publicly available and/or enacted. For much of this analysis, source documents were used directly, such as guidance documents from the SMART office and the Adam Walsh Act itself.

Textual Analysis. Research Question Four is addressed by performing a textual analysis of the State of South Carolina’s sex offender registry website. After reviewing state and other jurisdictional sex offender registry websites, South Carolina was chosen as the vehicle for this case study for a few reasons. First, the South Carolina site is highly-functional – lending more data and observable details. It is clear, by comparison, that South Carolina has placed some amount of emphasis on having a usable site and, thus, more can reasonably inferred abut intent: it would be harder, for example, to draw inferences about a state’s intent in which data is omitted, as this could be for lack of interest, political purposes, or simply a lack of resources. South Carolina’s choice to visibly devote the necessary resources to its registry site suggests, therefore, some amount of intentionality in what said

site chooses to display and how it does so. An array of textual analysis scholarship was consulted for this analysis, which the author will describe in Chapter Six as part of the analysis itself.

Scope. Michelle Cohen and E.L Jeglic describe five ways in which sex offenders are effectively impacted by legislation and policing.[98] These legal schemes are: mandatory sentencing laws, civil commitment, community notification, monitoring, and supervision. Within these five, while community notification may be conceptually self-explanatory, it's important to recognize the differences between monitoring and supervision. Monitoring, in both the work of Cohen and Jeglic as well as this thesis, refers to the positional monitoring of sex offenders who are not in state custody. Most often, this involves some form of satellite-based monitoring (SBM) – informally recognized as an ankle bracelet or other GPS tracker.[99] Supervision, meanwhile, is effectively the idea of a 'lifetime parole' – while offenders may not be corporeally monitored, they are subject to consistently having tabs kept on them throughout longer periods. In some states, for example, this might mean that offenders are on lifetime parole and must check in every six months with law enforcement. It may also mean mandated enrollment in treatment programs.[100] For the purposes of this thesis, the author will only be examining community notification and, in the few instances when it is required by registry-specific law, supervision. Sentencing, civil commitment, and the majority of monitoring issues will not be examined by this thesis. The only exception to this is the Fourth

[98] Michelle Cohen & Elizabeth L Jeglic, *Sex Offender Legislation in the United States: What Do We Know?*, 51 INT. J. OFFENDER THER. COMP. CRIMINOL. 369–383 (2007).

[99] *Id*. at 377-378.

[100] *Id*. at 378-379.

Amendment analysis in Chapter Five, which touches on Fourth Amendment issues found in the monitoring category of sex offender surveillance laws.

Definitions. For the purposes of this work, 'sex offender' will generally refer to those convicted of sex offenses in the United States and assumed to currently be, are required to be, or have previously been registered as required by law. While the use of the term 'offender' carries stigma and its own communicative power, the author feels that 'registrant' is less accurate for the purposes of this work: the work will describe various parts of the registration process, during many of which the individuals described are not yet registered. In order to avoid confusion, the term offender will be used, as it ostensibly begins at the moment of conviction. The sex offenses described generally in this thesis are assumed to range from what might be considered relatively minor, non-violent crimes, to more serious crimes of violence. Victims are also assumed to range in age and gender. Similarly, use of 'registries' and 'registration' do/does not intend to include voluntary groups, support groups, or other rehabilitative collectives, but instead refer solely to legally-mandated enrollment in state and/or national systems. Unless specified otherwise, phrases like 'the states,' 'states,' or other similar verbiage refer to jurisdictions defined by SORNA. These also include tribal lands and U.S. territories. As such, any mention of 'the states' is intended to mean a non-federal jurisdiction implementing its own sex offender registry. The Supreme Court of the United States will often be referred to as the 'Court,' or 'SCOTUS' whereas 'courts' will imply all lower courts, generally specified either in context or in the citation. In instances describing a specific court case, 'the Court' will simply mean the previously specified court unless otherwise noted.

While efficacy of registries and issues of recidivism are not the focus on this work, it

is worthwhile to have a definition of these terms to clarify the occasional reference and create a baseline understanding of what these very important terms mean in debate over sex offender registries. When discussing efficacy, Jeffrey Sandler et al. state that "the overarching goal of sex offender legislation is to make communities safer and reduce the number of people who are sexually victimized."[101] This work will adopt a similar definition of efficacy: in lieu of considering communal 'feelings' of safety, this work will consider efficacy as whether or not the instruments studied, as SORN-related legislation is highly focused on reoffending, actually result in a decrease in recidivism among registered sex offenders. Recidivism, for that matter, will be defined as sex offenses occurring subsequent to previous conviction and registration. This distinction matters, as some zealous prosecutors and legislators have historically included non-sexual offenses in their recidivism rates, while scholars generally do not.

Limitations. This study only consulted one legal research portal: Westlaw. Additionally, one limitation is access: many states do not make public their current statistics regarding sex offender registration. This also varies between states. When working with a patchwork of state laws – amidst federal mandates – there are many details that are simply unable to be known to researchers (if they are even fully known to the states).

The author will attempt to ensure that personal opinion statements are clearly distinguished from analytical statements and that analytical statements are supported by further evidence and/or are facially accurate. As it relates to biases, the author does not have any personal connection to the subject being analyzed (no close friends or family members

[101] Jeffrey Sandler, Naomi J. Freeman, & Kelly M. Socia, *Does a watched pot boil? A time-series analysis of New York State's sex offender registration and notification law*, 14 PSYCHOLOGY, PUBLIC POLICY, AND LAW, 284, 299 (2008).

on any registry, not a registrant himself, etc.).

Theory

Populist Punitiveness / Punitive Populism. There are a few theories that underpin this work, and which have guided the research. First among these is the concept of populist punitiveness, first coined by Anthony Bottoms in 1995. This theory describes the phenomenon of politicians drawing on a public moral stance and using it to their advantage – often at the expense of a particular group or individual. In the instance of sex offenders, there is no question that this arises from what Stanley Cohen describes as a 'moral panic.'[102] Mary Maguire and J.K. Singer build on this concept, defining the moral panic as the phenomenon that occurs when a minority group threatens the status quo of those in power.[103] In this instance, it is reasonable to assume that this perceived threat is a physical one, wherein the majority feel unsafe due to the actions of some in the minority group – i.e. sexual assault. As for the moral panic that arose in the 1990s, Renfro describes, a growing concern about 'stranger danger' in the late 1970s and through the 1980s, in which American culture had projected its racial and sexual anxieties – and anxieties about social change in general – onto a mythical epidemic of "deviant strangers emboldened by sexual liberation."[104] While there were relatively few of these cases, the 'sex panic' took the nation by storm.[105]

This is, in part, a product of media coverage. Scholars exploring the coverage of sex offenders, for example, have noted that the American media has "moved from [the position]

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[102] STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS (2002).

[103] Maguire, *supra* note 3.

[104] Renfro, *supra* note 52, at 7.

[105] *Id.*

of simply reporting events [regarding sex offenders] to one of instigating and exacerbating more extreme public reaction."[106] Renfro describes a media saturation that "breathed life into the discourse of missing children and child protection."[107] "Rare, isolated cases of missing and endangered youth – news of which traveled via television, newspapers, and political rhetoric – together generated an easily digestible composite of imperiled (white) childhood that confirmed fears of familial and national decline."[108] Others have highlighted how visceral the reaction of the public can be to these stories, causing rage in the streets and creating notable tales of infamous offenders.[109] One effect of this, according to some, is that *all* registered sex offenders are framed as monstrous – committing heinous and lurid crimes – allowing unregistered predators to remain under the radar. "Current media rhetoric therefore," writes Kirsty Hudson, "ignores the more typical sex offender and, in doing so, renders real offenders 'invisible.'"[110]

Public support, perhaps influenced by such media coverage, may also be what allows for populist punitiveness to thrive. Rates of support for public registries, for example, generally exceed 75 percent across the country.[111] Further, the vast majority of Americans –

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[106] Hudson, *supra* note 1, at 53.

[107] Renfro, *supra* note 52, at 15.

[108] *Id*.

[109] TERRY THOMAS, SEX CRIME: SEX OFFENDING AND SOCIETY 19 (2nd ed. 2005); *see* EAMONN CARRABINE, CRIME, CULTURE, AND THE MEDIA (2008).

[110] Hudson, *supra* note 1, at 72.

[111] *See* Yolanda Nicole Brannon et al*., Attitudes About Community Notification: A Comparison of Sexual Offenders and the Non-offending Public*, 19 SEX. ABUS. A J. RES. TREAT. 369–379 (2007); Andrew J. Harris & Kelly M. Socia, *What's in a Name? Evaluating the Effects of the "Sex Offender" Label on Public Opinions and Beliefs*, 28 SEX. ABUS. A J. RES. TREAT. 660–678 (2016); Sarah Koon-Magnin, *Perceptions of and support for sex offender policies: Testing Levenson, Brannon, Fortney, and Baker's findings*, 43 J. CRIM. JUSTICE 80–88 (2015); Roxanne Lieb & Corey Nunlist, *Community notification as viewed by Washington's citizens: A 10-year follow-up*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY (2008); Stacey Katz Schiavone & Elizabeth L.

between 60 and 90 percent – believe (without evidence) that public notification reduces sex offender recidivism and makes them feel safer.[112] It is no surprise then, that such a moral panic – and the subsequent populist punitiveness – begins to arise. This state of panic "creates a background effect of 'collective anger' and a 'righteous demand for retribution."[113] This 'righteous demand' is often followed by a series of moral regulations brought on by the social anxiety.[114] These regulations are likely to be "based not on meticulous policy evaluation, but instead, on societal demand … in an effort to assuage the fear of the masses."[115] To make matters worse, the confusion about sex offenders and whether they are diseased, have mental disorders, or are curable versus incurable can often cause sex offenders to be controlled in harsher ways than the reality might merit.[116] Often the "emotional charge in the passage of these laws ensured that there was little-to-no regard to the harmful impacts that the registry and community notification might have on sex offenders."[117]

Finally, after salacious media coverage, widespread belief that harsher punishment is effective, popular anger and a demand for retribution, amid a general confusion about sex

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Jeglic, *Public Perception of Sex Offender Social Policies and the Impact on Sex Offenders*, 53 INT. J. OFFENDER THER. COMP. CRIMINOL. 679–695 (2009).

[112] *See* Brannon, *supra* note 111; Koon-Magnin, *supra* note 111; Lieb, *supra* note 111.

[113] Lindsay A. Wagner, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 DREXEL LAW REV. 175, 178 (2009).

[114] Sean P. Hier, *Conceptualizing Moral Panic through a Moral Economy of Harm*, 28 CRIT. SOCIOL. 311–334 (2002).

[115] Vanessa Woodward Griffin & Mary Evans, *The Duality of Stigmatization: An Examination of Differences in Collateral Consequences for Black and White Sex Offenders*, JUST. QUART. 1-28 (Sept. 2019); *see* Kurt M. Bumby & Marc C. Maddox, *Judges' knowledge about sexual offenders, difficulties presiding over sexual offense cases, and opinions on sentencing, treatment, and legislation,* 11 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 4, 305-315.

[116] Michael Petrunik, Lisa Murphy & J. Paul Federoff, *American and Canadian approaches to sex offenders: A study of the politics of dangerousness*, 21 FED. SENTENCING REPORT. 111–123 (2008).

[117] Griffin, *supra* note 115, at 2.

offenders as a group, populist punitiveness rears its head. "Many of the current sex offender laws," writes James Vess et al., "appear to be a direct response to horrific sexual crimes, most often resulting in the death of the victim. Policymakers may subscribe to some of the common misconceptions about sexual offenders, and promote legislation that is not consistent with the available empirical evidence."[118]

Labeling Theory. One concept that may be useful as a theoretical underpinning of the problem with registries is labeling theory. Tannenbaum is regarded by many as a founding mind of labeling theory, the idea that by labeling someone, there's every chance that "the person becomes the thing he is described as being."[119] "Social identity is our understanding of who we are and of who other people are, and reciprocally, other people's understanding of themselves and others (which include us)."[120] This identity, of course, is influenced by how we are labeled – either by ourselves or by others.[121]

Criminal labeling has numerous deleterious effects on future delinquency.[122] While the labeling process has an important function in society, allowing society to "cultivate its identity" by applying the label to 'otherize' the deviant group and thereby reaffirm the community's moral order and identity, "the applied 'label' permits society to distrust, degrade, and segregate deviants" from its ranks.[123] "Empirical research," one scholar notes,

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[118] Vess, *supra* note 70, at 329.

[119] FRANK TANNENBAUM, CRIME AND COMMUNITY 20 (1938); *but see* Reza Barmaki, *On the Origin of "Labeling" Theory in Criminology: Frank Tannenbaum and the Chicago School of Sociology*, 40 DEVIANT BEHAV. 256–271 (2019) (refuting Tannenbaum as the founder of labeling theory).

[120] RICHARD JENKINS, SOCIAL IDENTITY (1996).

[121] Gwenda M. Willis, *Why call someone by what we don't want them to be? The ethics of labeling in forensic/correctional psychology*, 24 PSYCHOL. CRIME LAW 727–743 (2018).

[122] *Id.* (citing numerous research studies showing negative effects of criminal labeling)

[123] Griffin, *supra* note 115, at 4.

"has accumulated showing that formal labelling of persons who have engaged in delinquent or criminal behavior increases risk for future delinquency or crime, for example, through identity changes, blocked opportunities and increased association with deviant peers."[124]

Specific to sex offenders, "individuals with a conviction of a sexual offense [are] acutely aware of how the public perceive[s] them" and that, to both the public and the offenders, it is "no longer the sex offenders' crimes that are unacceptable, but the sex offenders themselves."[125] The stigma and label associated with being a sex offender goes beyond the traditional definition and exists as an 'extended social identity' that is internalized by the individual and is unable to be isolated as a single facet of their identity by either themselves or the public.[126] The label becomes "central to their individual and social identities."[127] "Regardless of guilt or innocence or the crime for which they were convicted, a legal determination that an individual has committed a sexual offense permanently changes his or her social identity."[128] The use of these terms about a person's past "presumes that we can infer from that past something that is true and meaningful about who a person is today--and not just something, but that it becomes one's central identity, the most relevant thing about them."[129] Thus, labeling someone as a 'registered sex offender,' therefore, "contradicts" a goal of "pro-social identity changes … in the process of desistance from

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[124] *Id.* at 728.

[125] Hudson, *supra* note 1, at 74.

[126] *Id*.

[127] Douglas N. Evans & Michelle A. Cubellis, *Coping with Stigma: How Registered Sex Offenders Manage their Public Identities*, 40 AM. JOUR. OF CRIM. JUS. 593-619, 594 (2015).

[128] *Id*. at 596.

[129] Guy Hamilton-Smith, *Banishing 'Sex Offenders': How Meaningless Language Makes Bad Law*, 50 SW. L. REV. 44, 56 (2020).

crime."[130] Simply put, there may be some very good-sounding reasons to label criminality, but the effects of the actual labeling often hinder the goals stated by those in favor of such labeling.[131] If this is the case, however, the question must be asked: why do we use sex offender registries to label sex offenders, given that it is at odds with rehabilitation? As Gwenda Willis asks, "why call someone by what we don't want them to be?"[132] The answer to this question may lie in performance theory.

Performance Theory. This theory, when applied to sex offender registries, suggests that the use of the registry furthers the goals of politicians and law enforcement agencies through its use as a performative strategy – a tool in which the government and its agencies demonstrate their worth and justify or request resources by framing problems, consequences, and remedies (residing within office of government). Literature relating to police performance, for example, show that crime and disorder reduces confidence in police. This is basic, of course, but the framing here is what matters: disorder, under this theory, is a performance of the police's ineffectiveness or inaction.[133] But what is this 'performance?'

Performance theory, at its core, is the concept that our decisions and actions – from the words we choose, to our haircut, to whether we have our morning coffee (and where we get that coffee), are all performances to signal judgments to ourselves and others. If we choose to eat cake for breakfast, perhaps we are signaling to ourself that we've earned a little

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[130] Willis, *supra* note 121, at 729.

[131] Katerina Hadjimatheou, *Criminal Labelling, Publicity, and Punishment*, 35 LAW PHILOS. 567–593 (2016).

[132] Willis, *supra* note 121.

[133] Kenneth Dowler & Raymond Sparks, *Victimization, contact with police, and neighborhood conditions: reconsidering African American and Hispanic attitudes toward the police*, 9 POLICE PRACTICE & RESEARCH 395-415 (2008).

indulgence. Perhaps we are trying to remind our spouse that today is our birthday. Erving Goffman first adapted the concept of dramaturgy from the world of theater to the world of sociology, as performance theory, in his 1956 book, *The Presentation of Self in Everyday Life*,[134] and since then this concept has been used to explain phenomena across disciplines. This concept of performance theory was later expanded by feminist scholar Judith Butler, who proposed that gender itself is performative.[135] Notably, this performance of gender isn't necessarily theatrical, but conveys and reinforces identities and where they sit in hierarchies of power.[136] This applies to the sex offender registry, though indirectly, as well. Registries arguably reinforce the identities and hierarchy among those involved – the citizen viewer as above the sex offender subject, with the authoritative law enforcement agency as the presenter of fact.

Further, the issue of sex offender registries spills over into both performance theories: micro-performance theory, which is concerned with the services provided by an institution, and macro-performance theory, which supposed that trust in institutions comes from more general phenomena.[137] For example, both groups of performance theorists would view the work of a fire department as performative to the community: the fire department likely operates in a way that is ultimately intended to build trust in the fire department. On top of

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[134] ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1956).

[135] Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE JOURNAL 4 (1988); *see also* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993); JUDITH BUTLER, UNDOING GENDER (2004).

[136] Butler (1988), *supra* note 135.

[137] Maarten Van Craen, *Explaining Majority and Minority Trust in the Police*, JUST. QUART. 1-26 (2012); Geert Bouckaert, Steven Van de Walle, Bart Maddens, & Jarl K. Kampen, *Identity vs Performance: An Overview of Theories Explaining Trust in Governement (Second Report: "Quality and Trust in Government")*, PUBLIC MANAGEMENT INSTITUTE, KATHOLIKE UNIVERSITEIT LEUVEN (2002).

the job they do in the community, many departments participate in community events (e.g., trucks in parades), and firetrucks are often on display near firehouses – clean, shiny, and well-maintained – among other examples. A micro-performance theorist, however, would view the services provided and their quality – how quickly and effectively fires are put out, how fast the fire trucks respond, etc. – as being the indicators for judging the fire department's performance. A macro-performance theorist would likely view the general sentiment and trends – a sense that there have been a lot of fires recently, that firefighters are generally good people, general trust in the government, etc. – as the indicators for judging the department's performance. In the case of sex offender registries, micro-performance theorists would view the performative nature of such registries as the service provided for the community either through its maintenance (the service of keeping the website up and running) or through the performance of its accomplishments (as a public record of the individual services provided through arresting and monitoring sex offenders). Meanwhile, macro-performance theorists might also view the registry as an indicator of performance because it emphasizes a supposed threat that it performatively claims is both looming, yet actively being addressed as a larger issue.

Performance, moreover, is important for institutions: Boukaert et al. suggest that the public's perception of institutional performance is as real to the people as real to people as the institution's actual performance.[138] And the police know this as well. "Police departments actively construct public images of themselves," writes Steven Chermak, "[and] the level of success achieved by police departments, when attempting to dictate a positive media image

[138] Bouckaert et al., *supra* note 137.

of themselves, affects how others define their role in society."[139] Chermak notes that police use media to "legitimate their role in society."[140] In an article pre-dating the public-facing sex offender registry, Chermak describes police departments working with news outlets as having "taken advantage of the opportunity to cut media costs, influencing their presentation in the news and securing public and political support in the process."[141] This work, in analyzing one state's sex offender registry, will examine whether this concept of manipulable, performative media is perhaps being utilized by police departments in the way they present their sex offender registries.

But how do these theories of populist punitiveness, labeling, and performance all collide? By using our societal outrage to label the group of our scorn – and then performatively punish and stigmatize this group – "sex offenders are disqualified from full social acceptance because of their mark of infamy that is difficult to hide or disguise," writes Griffin et. al. "If the stigma associated with an individual becomes too difficult to manage, the individual may surrender to the stigma by allowing it to become salient to their identity," which in turn could result in the individual reoffending.[142]

This work will call upon these theories further during the process of addressing each research question, though these theories will most prominently come into play during the analysis of Research Question Four, in which the author will look at the performative nature of one state's sex offender registry website. To get to that point, though, it is important to

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[139] Steven Chermak, *Image Control: How Police Affect the Presentation of Crime News*, 14 AM. J. POLICE 21 (1995).

[140] *Id.* at 35.

[141] *Id.* at 39.

[142] Griffin, *supra* note 115, at 4.

understand the background of such a website, beginning with what the federal and state laws require of jurisdictions' public-facing registry websites and the registration requirements for offenders themselves. Chapter Three will address this background and attempt to answer Research Question One.

CHAPTER THREE: WHAT DO STATE AND FEDERAL STATUTES FOR SEX OFFENDER REGISTRIES REQUIRE AND WHY?

The federal government requires that those convicted of federal sex offenses register in their respective states (this extends to states where they reside, study, or work).[143] Thus, Congress created a national system that – in part – provides specific requirements for various aspects of this registration.[144] This system – and the registry requirements – applies to federal sex offenders who had already completed their sentences when SORNA became law.[145] This chapter will detail the myriad list of requirements – for both the offenders and their respective jurisdictions – that SORNA mandates. The chapter will briefly describe SORNA's potential influence on subsequent state law and will also describe the patchwork of state and territorial laws that have emerged since SORNA's passage.

What Does SORNA Require?

Three Tiers. SORNA creates a three-tiered system of categorizing sex offenders.[146] These tiers determine minimums in terms of duration of registration, frequency of in-person appearances, and – in the case of the lowest tier – whether or not their information can potentially be exempted from website disclosure. Beginning with the most 'serious,' Tiers II

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[143] 34 U.S.C.A. § 2091 *et seq.* (West).

[144] *Id.*

[145] Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72).

[146] 34 U.S.C.A. § 20911(2-4) (West).

and III potentially apply to any offender whose convicted offense is punishable by imprisonment for more than one year in their jurisdiction.[147] Tier II largely concerns offenses against or which exploit minors (ranging from sexual contact with a minor to distribution of child pornography).[148] Tier III concerns what might universally be considered the more egregious offenses, such as aggravated sexual abuse, abuse of minors below the age of 13, and kidnapping of a minor. Tier III also includes recidivists and those with registration offenses. For example, any Tier II offender that fails to register – if that failure to register offense is punishable by one year imprisonment or longer – becomes a Tier III offender.[149]

Federal Requirements. Offenders must register in each jurisdiction where the offender resides, where they are an employee, and where they are a student.[150] For example, if our hypothetical offender – Abe – lives and works in North Carolina, but studies in South Carolina, he must register as a sex offender in both states. New offenders must register either before their sentence of imprisonment, if they are to be incarcerated, or within three business days after being sentenced, if they will not be incarcerated.[151] New offenders must also, for initial registration purposes, register in the jurisdiction in which they were convicted if this differs from their other applicable jurisdictions.[152] For example, if Abe is convicted in Colorado – though he lives/works in North Carolina and studies in South Carolina – he must also initially register in Colorado. Jurisdictions are required to inform new offenders (either

[147] *Id*. § 20911(3-4).

[148] *Id*. § 20911(3).

[149] *Id*. § 20911(4).

[150] *Id*. § 20913(a).

[151] *Id*. § 20913(b).

[152] *Id*. § 20913(a).

immediately after sentencing or shortly before their release from custody) of the duties of sex offenders under the law, explain those duties, require offenders to read and sign a form affirming their understanding of these duties, and ensure that the offender is registered.[153]

If an offender seeks to change their name, residence, employment, or student status, they must appear in person in at least one of their applicable jurisdictions within three business days of the change and inform authorities of all changes.[154] That jurisdiction then informs all other applicable jurisdictions of the changes.[155]

Offenders must keep their registration current in each of these applicable jurisdictions and SORNA requires states to provide a criminal penalty for failure to register that is no less than one year and no greater than ten years imprisonment.[156] Offenders must appear in person to verify their information and take a current photograph either yearly, every six months, or every three months, depending on their level of sex offense.[157] Offenders must also report their intended international travel information to their respective jurisdictions or face a fine, up to ten years imprisonment, or both.[158]

SORNA requires each jurisdiction to collect an array of information about each offender for use in its sex offender registry. Jurisdictions must collect all names, aliases, and remote communication identifiers and addresses.[159] These include nicknames, e-mail

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[153] *Id*. § 20919(a).

[154] *Id*. § 20913(c).

[155] *Id*.

[156] *Id*. § 20913(e)(Note: this requirement excepts federally recognized Indian tribes).

[157] *Id*. § 20918.

[158] 18 U.S.C.A. § 2250(b) (West).

[159] 34 U.S.C.A. § 20914(a)(1,7) (West).

addresses, and instant messaging usernames.[160] Jurisdictions must collect all telephone numbers, dates of birth, social security numbers, residential addresses, temporary lodging (any place in which the offender is staying for seven or more days), driver's licenses or identification cards, and travel and immigration documents (such as passports).[161] Jurisdictions must also collect the names and addresses of offenders' employers – including any place the offender volunteers or otherwise works without remuneration – and any professional licenses the offender holds.[162] As stated earlier, jurisdictions must collect school information on each offender (at any level of education), with the exception of online-only courses.[163] Jurisdictions must collect vehicle information – the license plate and a description of any vehicle owned or operated by the offender – with the exception of employers' rotating fleets.[164] For example, North Carolina does not have to require Abe to supply the license plate information of every city bus he drives as an employee. If he were a long-haul trucker assigned primarily to a single truck, however, he would need to supply that information to the state. Other required information includes a physical description of the offender, the text of the offense (the law that the offender is convicted of breaking), the offender's criminal history, a current photograph, fingerprints, palm prints, and the offender's DNA.[165]

As for what information is required to be publicly displayed on sex offender registry websites, SORNA states that jurisdictions are required to "make available on the Internet, in

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[160] *Id*.

[161] *Id*. § 20914(a)(2-3,7); *id*. § 20914(b)(7).

[162] *Id*. § 20914(a)(4,7).

[163] *Id*. § 20914(a)(5).

[164] *Id*. § 20914(a)(6-7).

[165] *Id*. § 20914(b)(1-6).

a manner that is readily accessible to all jurisdictions and to the public, *all information* about each sex offender in the registry."[166] Mandatorily exempted from this requirement – the broad category of "all information" – are the identities of any victims, offender social security numbers, arrests not resulting in a conviction, and travel and immigration document numbers.[167]

There is also a group of discretionary exemptions – scenarios in which the jurisdictions can choose not to display certain information.[168] The first exemption is for Tier I sex offenders. As described earlier, Tier I is what the statute considers to be low-level offenders. Thus, jurisdictions can choose not to display any information about its lowest-level sex offenders whose offenses do not involve minors.[169] The second exemption is for information about offenders' employers and the third exemption is for information about where the offender is a student (though an offender studying in a state must still register in that state).[170]

Additionally, SORNA requires that all registry websites include links to safety and education resources, instructions on how to seek correction of erroneous information, and a warning that information on registry websites should not be used to harass, injure, or commit a crime against registered individuals.[171]

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[166] *Id*. § 20920(a) (emphasis added).

[167] *Id*. § 20920(b).

[168] *Id*. § 20920(c).

[169] *Id*. § 20920(c)(1).

[170] *Id*. § 20920(c)(2-3).

[171] *Id*. § 20920(d-f).

In general, SORNA requires that offenders in Tier I must keep their registration current for 15 years, though jurisdictions have discretion to reduce this minimum period by 5 years for any Tier I offender who has maintained a 'clean record' for 10 years. This 'clean record' requires an offender to have no additional offenses (including non-sex-related offenses) punishable by more than one year imprisonment, no further sex offenses (regardless of whether it is punishable by imprisonment of a year or more), successful completion of all supervised release, probation, or parole, and completion of an appropriate sex offender treatment program.[172]

Tier II offenders are required to keep their registration current for 25 years, with no opportunity to lessen this minimum on the basis of a clean record.[173] Tier III offenders, meanwhile, are required to maintain their registration for life – with the only potential for reduction of this minimum being for offenses committed as a minor.[174] All adult Tier III offenders – including those 'upgraded' to Tier III from Tier II for failure-to-register convictions – must have lifetime registration.[175]

SORNA's Influence. SORNA's three-tiered system of offenders is, arguably, the system through which the federal government makes over-punishment and one-size-fits-all surveillance the path of least resistance for its jurisdictions. The federal government has created mandatory minimums that have complicated criteria – with the knowledge that state systems can often be overburdened in administering these programs. As an example, Jamie

[172] *Id*. § 20915(a)(1); *id*. § 20915(b)(1); *id*. § 20915(b)(2)(a); *id*. § 20915(b)(3)(a).

[173] *Id*. § 20915(a)(2).

[174] *Id*. § 20915(a)(3); *id*. § 20915(b)(2)(b); *id*. § 20915(b)(3)(b).

[175] *Id*. § 20915(a)(3).

Markham created a comprehensive attempt to divide and place one state's sex offenses within each federal tier.[176] Despite creating a series of rules for the effort and consulting additional attorneys, Markham found that while some offenses were "straightforward" to categorize, some "were much more complicated."[177] The proper tiering of one offense "has been an issue in several reported appellate cases in North Carolina – and the ultimate answer is still open to debate."[178] In order to counter this kind of complexity, the federal government encourages states to create statewide minimums that are all-encompassing: there's no reason to fret about whether an offender is Tier II or Tier III, for example, if a state mandates that all offenders that are not in Tier I must register for life. The federal guidelines seemingly support this overbroad classification approach outright. "For example," the guidelines state, "suppose that a jurisdiction decides to subject all sex offenders to lifetime registration, quarterly verification appearances, and full website posting … That would meet the SORNA requirements with respect to sex offenders satisfying the [Tier III] criteria … Hence, such a jurisdiction would be able to implement the [requirements] with respect to all sex offenders without any labeling or categorization, and without having to assess individual registrants against the tier criteria in the SORNA definitions."[179] The guidelines go on to encourage

[176] Jamie Markham, *SORNA Tier Chart*, N.C. CRIM. L. BLOG (Jun. 15, 2017), https://nccriminallaw.sog.unc.edu/sorna-tier-chart/.

[177] *Id*.

[178] *Id*.

[179] National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38045 (Jul. 2, 2008), *available at* https://www.federalregister.gov/documents/2008/07/02/E8-14656/office-of-the-attorney-general-the-national-guidelines-for-sex-offender-registration-and.

"any other approach a jurisdiction may devise" as long as the jurisdictional requirements for each Tier "meet or exceed" the SORNA requirements.[180]

The federal government has also issued additional guidelines related to SORNA which include, in part, the fact that "jurisdictions' discretion to go further than the SORNA minimum is not limited."[181] The guidance repeats, in nearly every section, some variety of this mantra (e.g., "As with other SORNA requirements, jurisdictions may require in-person appearances by sex offenders with greater frequency than the minimum required"). The guidance goes so far as maintain that jurisdictions "may wish" to keep an offender's information live on its registry website even when the offender has died, that said information "may remain of value" and promptly follows with the note that any minimums outlined "do not limit, and are not meant to discourage, adoption by jurisdictions of more extensive or additional measures" in their surveillance of offenders.[182]

What do the States Require?

A Patchwork of Laws. It should first be noted that many states/jurisdictions do not meet the SORNA requirements in some aspect.[183] In 2020, the Department of Justice Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) released a "State and Territory Implementation Progress Check," in which it found that 28 jurisdictions did not meet SORNA requirements as to which offenses and offenders were included in the system, 10 did not adequality address the tracking and penalizing of

[180] *Id*.

[181] *Id*.

[182] *Id*.

[183] SMART, U.S. DEPARTMENT OF JUSTICE: SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) STATE AND TERRITORY IMPLEMENTATION PROGRESS CHECK (Sep. 30, 2020).

absconders, 26 did not meet SORNA's community notification requirements, 29 did not meet the appearance and verification standards, and 17 did not meet the information sharing requirements.[184] Four jurisdictions satisfied none of the categories reviewed while 22 jurisdictions satisfied all five areas of review.[185] It should be noted that four of the five territories satisfied every area of review with Puerto Rico satisfying all but one of the categories.[186] This does not, however, imply that states are not actively increasing their surveillance of offenders. As of 2018, at least two-thirds of all registered sex offenders were subject to registration requirements for 25 years or life.[187]

Research on sex offender statutes has shown that these can "vary widely between states."[188] The most recent analysis of these statutes occurred in 2011, when Mancini et al. examined the extent of variation in registries, community notification policies, residence restriction policies, civil commitment schemes, lifetime supervision, driver's license markings, and chemical castration.[189] While there was no variability in the existence of registries (as each state is required to maintain a registry) or community notification, there was variation in each of the other categories. The authors concluded that states varied in the severity of their sex offender statutes but could not observe a clear pattern as to what might cause one state to be more invasive or restrictive than another.[190] Lytle conducted similar

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[184] *Id*.

[185] *Id*.

[186] *Id*.

[187] Willis, *supra* note 121; Alissa R. Ackerman et al., *Who are the people in your neighborhood? A descriptive analysis of individuals on public sex offender registries*, 34 INT. J. LAW PSYCHIATRY 149–159 (2011).

[188] Custer, *supra* note 84.

[189] Mancini, *supra* note 76.

[190] Mancini, *supra* note 76.

examination of registration and community notification policies of five Midwestern states in 2015 and found that states often differ in their definitions of sexual predators, juvenile registration, and which offenses require registration.[191] All five states varied in their frequency of policy changes, with 89 percent of that variation occurring from in-state pressures and politics.[192] Most recently, Custer examined the higher education reporting requirements nationwide and found that 20 states have higher-education-specific requirements for offenders, with 10 unique rules found across these 20 states, and that 31 states and territories listed names or addresses of the institutions where offenders work or study.[193] Nine websites allowed users to search for registrants by institution.[194] The author notes that this may be at odds with evidence that higher education may be rehabilitating and reduce recidivism.[195] Custer also comments on the variability of sex offender statutes between states, noting that "there may be unintended consequences of each state having a unique combination of sex offender laws."[196]

Adjacent Laws. Additionally, it is important to briefly mention the sex offender laws enacted by states and territories that – while they are not directly 'registry' laws – still involve the surveillance of sex offenders: chiefly GPS location tracking. As these are not the focus of this work, they will not be examined in great detail or analyzed as part of this thesis. They are, however, still relevant to provide the context of near-total surveillance to which

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[191] Robert Lytle, *Variation in Criminal Justice Policy-Making*, 26 CRIM. JUST. POL'Y. REV. 211–233 (2015).

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.* at 908.

registered sex offenders across the nation are subjected. This area of research deserves more inquiry but is too broad and complex for the scope of this work.

At this time, "more than forty U.S. states currently track at least some of their convicted sex offenders using GPS devices,"[197] and at least thirteen "have introduced lifetime supervision policies."[198] Most states use one of three primary models of GPS-tracking, often referred to as satellite-based monitoring (SBM).[199] The Florida Model generally requires electronic monitoring "when an offender who committed an enumerated crime is on probation after incarceration" and is the most prevalent form of SBM.[200] The California Model, meanwhile, represents one of the harshest statutory models. Unlike the Florida Model, which has clear limits on lifetime monitoring, the California Model mandates lifetime SBM for any offender, regardless of individual risk or when the crime occurred, who committed certain offenses. Additionally, the California Model requires offenders to pay for their tracking costs. The California Model is the second-most prevalent model in the United States. Finally, the Massachusetts Model allows judicial discretion for determining the length of probation, but mandates SBM for the entirety of that probation period for certain sex crimes. Additionally, those on parole for specific acts must also be monitored via SBM for the duration – including those on lifetime parole.[201]

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[197] Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, 21 NEW CRIM. LAW REV. 379–425 (2008).

[198] *Sex Offender Legislation in the United States: What Do We Know?*, 51 INT. J. OFFENDER THER. COMP. CRIMINOL. 369–383 (2007).

[199] Dante, *supra* note 66, at 1170-71.

[200] *Id*. at 1176.

[201] *Id*. at 1173-1186.

In summary, the vast majority of clear-cut rules originate in the federal mandate. This mandate – and the guidance that comes alongside it – encourages jurisdictions to lean toward over-classification with broad, sweeping regulations. It often suggests that states 'may' do things that the law does not require, with a wink-and-nod towards harsher punishment and increased surveillance. The states, meanwhile, are hard to pin down – many have expanded these rules, though many have clearly opted for parallel paths that do not conform to the specific standards required by SORNA. In essence, the federal government has told the states to a) be as harsh as they'd like (with the Constitution being the only guard rail) and b) to follow its complicated and administratively burdensome guidelines. The jurisdictions, for their part, have largely followed the first instruction, but many have ignored or outright refused to follow the second. Chapter Four will outline how the legislative goals of the federal government and the jurisdictions have collided with the harsh reality of the U.S. Constitution and individual state constitutions – and how this collision has shaped the current landscape of sex offender registry policy across the nation.

CHAPTER FOUR: HOW HAVE THE COURTS INTERPRETED THESE STATUTES?

Challenges

This chapter will survey some of the key cases and legal decisions that surround registries. There are not many landmark cases directly tied to registries, but there are patterns that this section will outline. Within the world of legal scholarship, there are lively debates about the constitutionality of public notification,[202] privacy rights,[203] adverse consequences (both to the public at large and the sex offender population),[204] and whether or not registries and the like are forms of ex post facto punishment – with the lion's share focusing on the latter.[205]

These debates are not confined just to scholarship, however. The Department of Justice (DOJ) notes that "offenders have launched unsuccessful [legal] challenges based on

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[202] *See* Hope E. Durant, *A Message to Sex Offenders: Sex Registration and Notification Laws Do Not Infringe Upon Your Pursuit of Happiness,* 26 J. LEGIS. 293 (2000) (arguing against any and all claims that the registry infringes on sex offenders' rights).

[203] Alan R. Kabat, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake,* 35 AM. CRIM. L. REV. 333 (1998) (arguing that the lack of a significant limit on the states – as opposed to just a floor – creates a privacy issue that does not square well with the Fourth Amendment)

[204] *See* Ofer Raban, *Be They Fish or Not Fish: The Fishy Registration of Nonsexual Offenders,* 16 WM. & MARY BILL RTS. J. 497 (2007) (arguing that overbroad SORNA definitions sweep up non-sexual offenders and cause significant harm); *see* Shannon C. Parker, *Branded for Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification,* 21 VA. J. SOC. POL'Y & L. 176 (2014) (making note of the increasingly negative effects on minors swept up by the registry).

[205] See generally Ryan W. Porte, *Sex Offender Regulations and the Rule of Law: When Civil Regulatory Schemes Circumvent the Constitution,* 45 HASTINGS CONST. L.Q. 715 (2018); *see also* 17B Am. Jur. 2d Constitutional Law, *§ 703. Sex offender legislation* (2020).

the following arguments: takings, double jeopardy, procedural due process, substantive due process, equal protection, the right to a trial by jury, right to travel, cruel and unusual punishment, full faith and credit, the supremacy clause, separation of powers, and federalism concerns."[206] This laundry list of citations is intentional, as it goes to illustrate that very few challenges to SORN-related or adjacent laws are successful.

Ex Post Facto. The *ex post facto* clause of the United States Constitution prohibits punitive laws with retroactive force.[207] It's important to note that retroactive force does not, in most of the cases that have appeared on this issue, necessarily arise because the individual was convicted of their sex offense prior to the passage of the state's SORN-adjacent registry laws. While that was an extensive issue upon SORNA's passage years ago, more recent challenges come from registered sex offenders who argue that amendments or expansions of existing registry-related law are retroactive punishments for crimes they committed prior the 'updated' regulations. Going back to our hypothetical, Abe might have a claim upon the original passage of the Adam Walsh Act, but he might also argue that every new increase and rule that is added to the law – even if the original law existed at the time of his conviction –

[206] Smith v. Commonwealth, 743 S.E.2d 146 (2013) (holding that the state's reclassification of appellant's conviction as a sexually violent offense was not an unconstitutional taking and did not violate the appellant's right to due process); Vazquez v. Foxx, 895 F.3d 515 (2018) (holding that residency restrictions did not constitute a taking and did not violate due process rights); State v. Sparks, 657 S.E.2d 655 (2008) (holding that post-release revocation hearing did not constitute a criminal prosecution and, therefore, was not double jeopardy); Murphy v. Rychlowski, 68 F.3d 561 (2017) (holding that post-deprivation process was not a due process violation); Litmon v. Harris, 768 F.3d 1237 (2014) (holding that lifetime in-person registration did not violate due process rights and did not violate *ex post facto* clause); Carney v. Okla. Dep't of Pub. Safety, 875 F.3d 1347 (2017) (holding that a law requiring sex offender to have an indicating mark on his driver's license was not cruel and unusual and did not violate the Equal Protection clause); People v. Nichols, 176 Cal.App.4th 428 (2009) (holding that indeterminate life sentence for failure to register as a sex offender did not constitute cruel and unusual punishment); Rosin v. Monken, 599 F.3d 574 (2010) (holding that Illinois' refusal to honor a New York plea agreement waiving sex offender registration was not in violation of the Full Faith and Credit clause of the U.S. Constitution); U.S. v. King, 431 Fed.Appx. 630 (2011) (holding that appellant had no redressable injury regarding the Supremacy Clause); DEPARTMENT OF JUSTICE, *Sex Offender Registration and Notification in the United States: Current Case Law and Issues - March 2019* 1 (2019).

[207] U.S. CONST., ART. I, § 10, CL. 1, (1787).

constitutes a new restriction (and, in many cases, these amendments do create very real restrictions) that extends to the point of punishment. The key to *ex post facto* claims, of course, is the element of punishment. The Supreme Court created a two-pronged, seven-part "intent-effects" test in *Kennedy v. Mendoza-Martinez* to determine if a regulation was punitive in nature.[208] In *Smith v. Doe*, a landmark case in 2003, the Court relied on the *Mendoza-Martinez* test and found that a challenge to SORN as a violation to the *ex post facto* clause did not have merit. Directly addressing "whether the registration requirement is a retroactive punishment prohibited by the *Ex Post Facto* Clause," the Court held that because SORN (in this case the Alaska State parallel law) "is nonpunitive, its retroactive application does not violate the *Ex Post Facto* Clause."[209]

The *Smith v. Doe* decision had an immediate ripple effect across the states, for multiple reasons. California's reversal of significant case law is one example. Twenty years prior to *Smith*, in 1983, *In re Reed*, a case before the Supreme Court of California, had challenged the mandatory registration of someone convicted for misdemeanor disorderly conduct after he masturbated in front of an undercover vice officer in a public restroom.[210] The court in *Reed* had held that the mandatory application of the relevant sex offender registration statute constituted cruel and unusual punishment in this instance due to the punitive nature of registration.[211] At the time of *Reed*, only five states maintained sex

[208] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (establishing a seven-point balancing test to determine whether or not a regulation is punitive); *see* U.S. v. Ward, 448 U.S. 242 (1980) (confirming and clarifying the *Mendoza-Martinez* test.

[209]Smith v. Doe, 538 U.S. 84 (2003).

[210] *In re* Reed, 663 P.2d 216, 216, 191 Cal. Rptr. 658, 658, 33 Cal.3d 914, 917 (Cal., 1983).

[211] *Id*.

offender registries.[212] In the year following *Smith v. Doe*, however, the California Supreme Court relied on the SCOTUS ruling when it decided *In re Alva*, wherein it overruled *Reed* and held that registration itself could not be considered a form of cruel and unusual punishment.[213] The *Alva* court referenced the *Smith* rationale, that registration is a nonpunitive practice, by stating that *Smith* had "confirmed beyond doubt" the nonpunitive nature of registration.[214] In short, Smith not only has an impact on similar ex post facto claims, but also cruel and unusual punishment claims: how could new challengers argue that sweeping registration laws constituted cruel and unusual punishment if the Supreme Court's reasoning in the *ex post facto* challenges relied on the fact that the Court viewed such sweeping registration laws as not even rising to the level of punishments at all?

Since 2003, federal courts have overwhelmingly continued down the path of *Smith*, with *ex post facto* challenges falling flat in the First, Tenth, and Eleventh Circuits.[215] A Sixth Circuit decision in 2012 flatly stated that there is a "unanimous consensus among the circuits that SORNA does not violate the Ex Post Facto Clause."[216] State Supreme Courts in Idaho, Wyoming, and Rhode Island, among others, have stood behind *Smith*, finding that their respective state's implementation of SORNA did not violate the *ex post facto* clause.[217] As

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[212] *In re* Alva, 92 P.3d 311, 313, 14 Cal.Rptr.3d 811, 813, 33 Cal.4th 254, 261 (Cal., 2004) (holding that statutory requirement of registration by one convicted of a sex crime cannot be considered 'punishment' as it relates to proscriptions against cruel and unusual punishment).

[213] Alva, 92 P.3d at 314, 14 Cal.Rptr.3d at 815, 33 Cal.4th at 264 (Cal., 2004).

[214] Alva, 92 P.3d at 321, 14 Cal.Rptr.3d at 823, 33 Cal.4th at 273 (Cal., 2004).

[215] *See generally* U.S. v. DiTomasso, 621 F.3d 17 (1st Dept. 2010), *cert. granted, judgment vacated*, 565 U.S. 1189 (2012*), abrogated by* Reynolds v. U.S., 565 U.S. 432 (2012); Doe v. Shurtleff, 628 F.3d 1217 (10th Cir. 2010); Parker v. King, 2:07-CV-624-WKW, 2008 WL 901087, at *1 (M.D. Ala. Mar. 31, 2008).

[216] U.S. v Felts, 674 F.3d 599, 605-06 (6th Cir. 2012).

[217] *See generally* State v. Gragg, 137 P.3d 461, 463 (Idaho 2005); Vaughn v. State, 391 P.3d 1086 (Wyo. 2017); State v. Gibson, 182 A.3d 540 (R.I. 2018).

sex offender regulation statutes have been deemed nonpunitive in nature by the Supreme Court, "states are free to restrict sex offenders in ways that would be constitutionally impermissible if applied to almost any other group of people."[218]

There have been, however, some recent signs of a potential judicial shift in this area. In 2016, in *Doe v. Snyder*, six registered sex offenders challenged expansions of Michigan's sex offender statutes on a number of grounds, including *ex post facto*.[219] The Sixth Circuit Court of Appeals first agreed, in part, with *Smith*, holding that the intent of the law was not punitive.[220] On the issue of whether or not the "actual effects" were punitive, however, the Court distinguished the Michigan case from *Smith* in a blistering rebuke, referring to the state's sex offender registry program as "a byzantine code governing in minute detail the lives of the state's sex offenders"[221] and noted that the state's sex offender laws "resemble traditional shaming punishments."[222] Unlike *Smith*, the Court found the combined impositions of registration, surveillance and location-based restrictions to be direct restraints on personal conduct under the same *Mendoza-Martinez* test applied by SCOTUS in *Smith*. When the state argued that such restraints were "minor and indirect," the Court countered by stating that "something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound. Indeed, those irons are always in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including

[218] Porte, *supra* note 205, at 733.

[219] Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016).

[220] *Id*. at 700-701.

[221] *Id*. at 697.

[222] *Id*. at 702.

imprisonment."[223] The Court also distinguished Michigan's laws from those in *Smith*, noting that Michigan's restraints "are greater than those imposed by the Alaska statute by an order of magnitude" and that "while the statute's efficacy is at best unclear, its negative effects are plain on the law's face."[224] In doing so, the Court in *Snyder* used the same balancing test – *Mendoza-Martinez* – as SCOTUS, but came to an opposite conclusion. In a recent lower court decision affirmed by the Sixth Circuit Court of Appeals, *Willman v. U.S. Attorney General*, the Court clarifies that the decision in Snyder "has no bearing on the constitutionality of SORNA" because Snyder "only addressed the constitutionality of Michigan's [parallel law]" which included residency and other spatial restrictions which do not exist in the federal mandate.[225]

Michigan is not alone in asserting its sovereign power to come to a different legal conclusion according to state law. Six other state supreme courts – Oklahoma, Maryland, Ohio, Indiana, Maine, Alaska, and Missouri – have found that retroactive application of sex offender registration laws went against their state constitutions since the *Smith* decision.[226]

It should be noted that there is some confusion about the stance of the Supreme Court of Kansas. Strangely, that court released two contradicting opinions on the same day in 2016

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[223] *Id*. at 703.

[224] *Id*. at 705.

[225] Willman v. U.S. Off. of Atty. Gen., 19-10360, 2019 WL 4809592, at *3 (E.D. Mich. Oct. 1, 2019), *aff'd sub nom*. Willman v. Atty. Gen. of U.S., 972 F.3d 819 (6th Cir. 2020), *cert. denied sub nom*. Willman v. Wilkinson, 20-765, 2021 WL 231581 (U.S. Jan. 25, 2021), *reh'g denied sub nom*. Willman v. Garland, 20-765, 2021 WL 1074836 (U.S. Mar. 22, 2021).

[226] *See* Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1035-36 (Okla. 2013) (detailing all case law from state courts regarding retroactive application of sex offender registration and notification statutes); Doe v. Dep't of Pub. Safety & Corr. Servs., 62 A.3d 123, 149 (Md. 2013); State v. Williams, 952 N.E.2d 1108, 1113 (Ohio 2011); Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009); State v. Letalien, 985 A.2d 4, 31 (Me. 2009); Doe v. State, 189 P.3d 999, 1019 (Alaska 2008) (same plaintiff as in Smith v. Doe, 538 U.S. 84 (2003)); Missouri's case, Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006) (en banc) (has subsequently been rendered moot); Doe v. Lee, 2009 WL 21097, at *4.

– with the first opinion holding that its state's sex offender registration statute constituted a punishment (and was thus an *ex post facto* violation), and the second opinion overruling the first and holding the exact opposite.[227] The Kansas Supreme Court has, at least five times, declined to revisit the *ex post facto* question and the law remains in effect.[228]

Importantly, though, the decision in *Willman* is crucial to the interaction between the states and the federal government: the Court held that a sex offender, even if released from a state's sex offender registration requirements, is bound to still comply with federal regulations. The Court stated that a plaintiff who had been removed from Michigan's sex offender registry "is required to comply with SORNA even though Michigan has removed him" from its system.[229]

Other Judicial Action. There have been other notable judicial challenges regarding SORN and SORN-adjacent law, though these challenges range scope and scale. In 2013, the Court held that Congress had the authority to impose SORN registration requirements on those who had broken state laws created for SORN purposes.[230] While the Court recently held that a failure to update a residence status after moving internationally was not a violation of federal law, it did note that the move violated Kansas law and would likely have violated International Megan's Law.[231]

There have been some areas of this issue in which legislation and the courts have decidedly begun to roll back some of the over-zealous measures against sex offenders. In

[227] Doe v. Thompson, 373 P.3d 750 (2016).

[228] State v. Petersen-Beard, 377 P.3d 1127 (2016).

[229] Willman, *supra* note 225, at 3.

[230] U.S. v. Kebodeaux, , 570 U.S. 387 (2013).

[231] U.S. v. Nichols, , 136 S.Ct. 1113 (2016).

particular, juvenile offenders have seen modest victories in state courts regarding lifetime registration requirements – with the highest court in both Ohio and Pennsylvania respectively holding that lifetime registration requirements for juvenile offenders were unconstitutional.[232] But, even in this realm, there is much more to be done.[233]

Some of the more egregious rights violations have already been halted by the courts, but serve as examples of the intrusiveness of the state and federal laws that proscribed them. Multiple courts, both state and federal, have held that the collection of Internet identifiers – such as usernames, etc. – violates the First Amendment.[234] In *Packingham v. North Carolina*, the Supreme Court held that a North Carolina statute prohibiting registered sex offenders from using social media websites also violated the First Amendment.[235] Being ordered to register as a sex offender was held by a federal court in Massachusetts to trigger the protections of procedural due process,[236] and Utah's highest court held that publishing information about an offender's 'primary and secondary targets' similarly violated this due process.[237] When underlying convictions are not sexual in nature, a Texas appellate court held that being ordered to register as a parole condition also violated due process.[238] Very importantly, a federal court held that a "three-strikes" sentence based on a failure to register

[232] In re C.P., 967 N.E.2d 746 (2012); In re J.B., 107 A.3d 16–17 (2014).

[233] Marsha Levick & Riya Saha Shah, *The Momentum Builds: Challenging Lifetime Registration of Juveniles Convicted of Sexual Offenses in The Post-Roper Era - N.Y.U. Review of Law & Social Change: Panel Series on Sex Offender Registration Laws*, 40 HARBINGER 115 (2016).

[234] Doe v. Prosecutor, 705 F.3d 694 (2013); Doe v. Nebraska, , 898 F. Sup 1086 (2012).

[235] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[236] Brown v. Montoya, , 662 F.3d 1152 (2011).

[237] State v. Briggs, 199 P.3d 935 (2008).

[238] Ex Parte Evans, 338 S.W.3d 545 (2011).

conviction acts as a cruel and unusual punishment.[239] Similarly cruel and unusual, as found by the Supreme Court in Georgia, is the sentence of mandatory life imprisonment for a second conviction of failure to register.[240] That's important to reiterate: it took a case making it to Georgia's Supreme Court to claw back enacted law that would force judges to send people – who had already paid for their crimes – back to jail *for life* solely because they failed to register more than once.

The primary way that SORN and similar laws are challenged in the United States is by using the potentially punitive aspects of the laws to argue that civil schemes – such a registration, SBM, etc. – are, in fact, criminal punishments. While there are several ways in which other Constitutional rights are impacted and argued, it appears that *ex post facto* challenges are most common. Still, as these laws expand and harshen, as they have for many years, the opportunity to challenge them as cruel and unusual punishment violations may grow as well. As it stands, these challenges provide insight into the scope and depth of state surveillance of sex offenders. Surveillance, however, is often legally addressed using the Fourth Amendment as a guiding force. Chapter Five will address any existing Fourth Amendment issues and discuss what potential issues may arise in the future

[239] Gonzalez v. Duncan, 551 F.3d 875 (2008).

[240] Bradshaw v. State, 671 S.E.2d 485 (2008).

CHAPTER FIVE: CURRENT AND FUTURE FOURTH AMENDMENT ISSUES

Sex Offender Laws, Generally

The surveillance of registered sex offenders at the state and federal level is, by any standard, immense. When it comes to 'surveillance,' the first stop of any legal analysis will likely involve what rights are at stake. Theoretically, there are a lot of 'rights' at play, though they are vague and/or possibly penumbral in nature. Do we believe, for example, that a person has a right to move freely? The Court has alluded to this right – such as a right to travel between states – but has rarely connected it specifically to a clear 'right' (though sometimes bringing in the right of due process). Does monitoring and exclusion go against the greater ethos of autonomous freedom that birthed the American judicial system? Many scholars feel that it does – though doctrinally, this is hard to pin down and the theory is often woven into the doctrine.

The Fourth Amendment of the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government.[241]

[241] U.S. Const. amend. IV.

Current Issues. Historically, "the Fourth Amendment has not offered purchase for pushback to laws regulating convicted sex offenders."[242] Recently, however, there have been signs of a shift in this regard.

For many years, Fourth Amendment issues were not focused on individuals, but primarily on property rights.[243] This changed in *Katz* in 1967, when the Supreme Court declared that "the Constitution protects people, not places" and that a search occurs when a person's "reasonable expectation of privacy" is breached – regardless of a physical trespass upon their property.[244] Charles Katz had been arrested after he was recorded making illegal bets over the telephone. The recording device had been positioned outside of the phone booth in which Katz was speaking – and Katz argued that a private phone call inside the phone booth was in invasive search. The Court agreed, and noted that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[245] In *Katz*, the Court created a 'reasonable expectation of privacy test' that has not been replaced.[246]

The next landmark decision, as it relates to the Fourth Amendment rights of those being monitored or tracked, came about in 2012.[247] In *U.S. v. Jones*, police received a warrant to attach a GPS tracking device to Antoine Jones' vehicle.[248] In the course of the

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[242] McJunkin, *supra* note 197, at 385.

[243] *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 S. CT. REV. 67 (2012) (providing an interesting background on the history of the Fourth Amendment).

[244] Katz v. U.S., 389 U.S. 347 (1967).

[245] *Id*. at 351.

[246] *Id*. at 353.

[247] U.S. v. Jones, 565 U.S. 400 (2012).

[248] *Id*. at 402-03.

investigation, the police exceeded the geographical boundaries and time limits provided by the warrant.[249] Jones claimed that this was a Fourth Amendment violation, while the police argued that there was no search.[250] In its decision, the Court held unanimously that this certainly constituted a search, but there was a 5-4 split as to the rationale behind this decision. The majority found that the GPS monitoring was a search due to the physical trespass required by the police to place the device on the vehicle, while each of the minority concurrences included some privacy-related rationale related to warrantless GPS surveillance generally.[251] The Court also noted – in what has been called "the return of the trespass test"[252] – that *Katz* had never intended to replace the common-law meaning that had come before it, but had expanded the overall protections to include both rationales. The reasonable expectation of privacy test in *Katz*, wrote Justice Scalia for the majority, "has been *added to*, not *substituted for*, the common-law trespassory test."[253]

Thanks, in large part, to the seismic shift in *Katz* and the more recent decision in *Jones*, there are many Fourth Amendment issues that now arise out of sex offender laws generally, with the majority focusing on SBM and home visits by authorities.

The most notable case thus far is *Grady v. North Carolina*.[254] *Grady* revolved around the issue of lifetime SBM in North Carolina. Shortly after *Jones*, Torrey Dale Grady – a recidivist sex offender ordered to enroll in lifetime SBM – relied on the *Jones* decision when

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[249] *Id*. at 403.

[250] *Id*. at 410.

[251] *Id*. at 402, 413, 418.

[252] Kerr, *supra* note 243, at 67.

[253] Jones, *supra* note 247, at 409.

[254] Grady v. N.C., 575 U.S. 306 (N.C. 2015).

he argued that the SBM program was a warrantless search. While the North Carolina Court of Appeals rejected this argument (and the North Carolina Supreme Court declined to review it), the case was taken up by SCOTUS after Grady petitioned to the high court directly.[255] The Supreme Court agreed with Grady, however, and vacated the previous ruling – holding that "a State conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."[256] The Court also found that the SBM program itself constitutes a search under the Fourth Amendment as it "physically intrud[es] on a subject's body" with the purpose of "obtaining information."[257] The Court did not, however, address "the ultimate question" of whether or not the search was a *reasonable* search, which would determine whether the SBM in question would violate Grady's Fourth Amendment rights.[258] At this point, there has been no significant follow-up to the *Grady* decision at the federal Circuit or Supreme Court levels.

While the response to *Grady* in North Carolina is not necessarily representative of how each and every jurisdiction will respond to the 2015 ruling, it seems appropriate to use the case of Grady himself as a purposive example of the SCOTUS ruling's impact on state affairs. Grady's own case was headed back to the North Carolina state courts to address whether such a search was reasonable. Following the SCOTUS decision in *Grady*, the state had since been holding '*Grady* hearings,' in which the State would attempt to persuade the trial court that its application of SBM on an individual was a reasonable one.[259] The North

[255] *Id*.

[256] *Id*. at 309.

[257] *Id*. at 308, 310.

[258] *Id*. at 310.

[259] *See* State v. Spinks, 256 N.C.App. 596, 612 (2017) (referring to '*Grady* hearings').

Carolina Court of Appeals had, thus far, rejected these trial court decisions, citing the lack of evidence provided by the State beyond the mere fact that the individual was a sex offender.[260] Grady himself was now back at the North Carolina Court of Appeals, challenging his own '*Grady* hearing' decision.[261] The Court of Appeals, this time around, sided with Grady, with Judge Ann Marie Calabria writing that not only did "the State [fail] to present any evidence concerning its specific interest in monitoring [Grady], or of the general procedures used to monitor unsupervised offenders,"[262] it also "failed to present any evidence of [the SBM program's] efficacy in furtherance of the State's undeniably legitimate interests."[263]

After the State appealed, the North Carolina Supreme Court actually expanded on the Court of Appeals decision. Writing for the majority, Justice Anita Earls found that not only was Grady's SBM enrollment unconstitutional, but that "the State's SBM program is unconstitutional in its application to all individuals in the same category as defendant" which includes unsupervised individuals who have completed their sentences but are subject to SBM solely for being recidivists.[264]

Future Issues. What is on the horizon for sex offender laws and the Fourth Amendment? There is no question that Fourth Amendment issues will continue to develop in the areas of SBM and monitoring generally, though it is unclear how the Supreme Court

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[260] *See* State v. Blue, 246 N.C.App. 259, 264-65 (2016) ("the State shall bear the burden of proving that the SBM program is reasonable . . . [and] the trial court erred by failing to conduct the appropriate analysis"); State v. Greene, 255 N.C.App. 780, 781 (2017) (finding that when the State "offered no further evidence [of reasonableness] beyond [the] defendant's criminal record" that the State had not overcome the defendant's privacy interests).

[261] State v. Grady, 259 N.C.App. 664 (2018).

[262] *Id*. at 674-75.

[263] *Id*. at 675.

[264] State v. Grady, 372 N.C. 509, 522 (2019).

might weigh in on the 'reasonableness' standards that are left vague in its *Grady* decision. There will undoubtedly be changes across the country to SBM programs and the judicial processes for enrolling offenders. Even in the example of North Carolina, changing SBM policies may be an avenue for affecting future decisions.[265]

There are a few minor paths for sex offender laws to impact the Fourth Amendment, though it is unlikely that they will be successful on Fourth Amendment grounds alone. For example, exclusion laws – such as a law stating that registered sex offenders are prohibited from public libraries, for example – are often defeated on other grounds (in the case of libraries, most likely the First Amendment). The primary path for the Fourth Amendment, then, is through challenging residency and other spatial restrictions. An example of this, and how it could – very theoretically – play out in a legal challenge is what are referred to as 'move on orders.'

Move on orders are the classic order by law enforcement to disperse loiterers – 'keep it moving,' etc. – and are sometimes referred to casually as ABH orders, or 'anywhere but here' orders. Stephen Henderson explores the concept of move on orders as a Fourth Amendment issue, asking whether a demand to depart constitutes a seizure of a person.[266] It is a tricky concept because, theoretically, every exclusion is forced movement. If we picture public space as a general area in which we are free to move, any new rule excluding us from

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[265] *See* Jamie Markham, *Satellite-Based Monitoring Is Unconstitutional for All Unsupervised Recidivists*, N.C. CRIM. L. BLOG (Sep. 12, 2019), https://nccriminallaw.sog.unc.edu/satellite-based-monitoring-is-unconstitutional-for-all-unsupervised-recidivists/ ("I also wonder how much the SBM program will need to evolve from its 'current implementation' before it falls outside the ambit of the facial holding in *Grady.* For instance, would a new device make a difference? … But if we assume for the sake of argument that the intrusiveness and effectiveness prongs of the reasonableness balancing test are roughly the same for [other] categories as they were for recidivists, then it seems all of them could be on shaky constitutional footing after *Grady*").

[266] Stephen E. Henderson, *'Move On' Orders as Fourth Amendment Seizures*, 2008 B.Y.U. L. REV. 1 (2008).

one area – because public space within the general area is finite – requires us to be in the (now marginally smaller) general area. Taken to an extreme, for example, house arrest could be viewed through the lens of being excluded from leaving one's property. Most of the time, though, this is unlikely to be a reasonable complaint. "The police, by excluding me from the park, are forcing me into the non-park area – and this is a seizure" is unlikely to be seen as a valid argument. A better argument, in the case of a park, might be the First Amendment argument that police are excluding someone from a protest in the park, etc. For the move on order as Fourth Amendment violation argument to take root and gain any amount of traction, the exclusionary regulations would likely have to be extreme – perhaps prohibiting offenders from being in almost all public spaces.

It is clear that Fourth Amendment issues are going to arise in the context of sex offense law generally, though it remains to be seen exactly how it might play out in the courts. Still, these laws are significantly more likely to impact Fourth Amendment protections than registry-specific laws, as the next section will discuss.

Registry Laws

Current Issues. As it stands, Fourth Amendment issues related to registries themselves are fairly sparse. Counter to what the author expected in this regard, there has been very little in the way of Fourth Amendment challenges to SORN or SORN-adjacent community notification law. The most notable developments in this area are extremely recent – so recent, in fact, that they occurred during the writing of this work.

In 2020, the Sixth Circuit considered the appeal of M.S. Willman, who challenged the application of SORNA itself on multiple grounds.[267] One of these grounds was the Fourth

[267] Willman v. Attorney General of the United States, 972 F.3d 819 (2020).

Amendment.[268] Willman sought a declaration that SORNA was unconstitutional. As for his Fourth Amendment argument, Willman argued that the registration itself – and the requirement to go in-person – rendered him 'in custody' during that period.[269] The Sixth Circuit made little fuss in dismissing this shaky argument out of hand. "SORNA does not render Willman 'seized,' so his Fourth Amendment claim is not facially plausible," the Court stated.[270] Willman was ultimately unsuccessful in all of his arguments, including the claim that he was not required to register for SORNA if state law did not require him to do so.[271] In January of 2021, the Supreme Court declined to take up the case.[272]

It is unlikely that we will see much in the way of Fourth Amendment issues in registry-specific law, but only time will tell. Next, Chapter Six will describe and provide basic analysis of the South Carolina registry website in order to weave together a larger analysis through the thesis' theoretical lenses in Chapter Seven's final analysis.

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[268] *Id*.

[269] *Id*.

[270] *Id*. at 826.

[271] *Id*. at 824.

[272] *See* Willman v. Wilkinson, 20-765, 2021 WL 231581, at *1 (U.S. Jan. 25, 2021), *reh'g denied sub nom.* Willman v. Garland, 20-765, 2021 WL 1074836 (U.S. Mar. 22, 2021).

CHAPTER SIX: CASE STUDY OF SOUTH CAROLINA'S SEX OFFENDER REGISTRY WEBSITE

Website Design

This chapter will describe and attempt to qualitatively break into distinct parts the South Carolina sex offender registry website, which will then be analyzed through the lenses of the theories outlined in this thesis. The analysis finds numerous instances of labeling, ties to punitiveness, and an overarching series of performances by the state inherent in the website. Although this chapter concentrates on one state's website, I will offer comparisons, where appropriate, of other states' sex offender registry websites.

Landing Page. The South Carolina Public Sex Offender Registry (hereafter referred to as "the SC Registry") opens with a page entitled 'Conditions of Use.' The upper third of the page uses a waving American flag as its background on the left, and the South Carolina state flag on the right. The seal of the South Carolina State Law Enforcement Division (SLED) is positioned in the foreground. It reads, "South Carolina" in gold cursive writing "STATE LAW ENFORCEMENT DIVISION" in uppercase white serif-font, with "An Accredited Law Enforcement Agency" below. This aspect alone, when compared to the minimal-effort nameplates seen in a large majority of sex offender websites (from the author's extensive experience in researching such sites) is a visual sign of intentional 'seriousness.' Further, it suggests the information contained on the site is 'official' and perhaps has met specific, formal standards.

Below the nameplate sits a gray navigational menu with six options. The options are clearly marked and do not contain any drop-down lists on mouseover. The options are 'Geographic Search,' 'Name Search,' 'Community Notifications,' 'FAQs,' 'Resources,' and 'Contact Us.'

In a bordered box, the landing page contains a recommended browser for best results, followed by a brief welcome. The welcome message says the following:

> Welcome to the South Carolina Sex Offender Registry!
>
> South Carolina has moved to a new sex offender management application called SORT. SORT is provided at no charge by the U.S. Department of Justice to the State of South Carolina. SORT is designed to make the sex offender registry process as efficient and effective as possible. This streamlined process also provides improved information sharing across all jurisdictions. SORT provides community notifications and automatic updates to the National Sex Offender Public Web Site. Other features include multiple photographs of the offender over time, a visual map of where the offender lives, a list of aliases the offender has used in the past, and a list of all of the sexually related offenses that an offender has been convicted of committing.
>
> Signing up for SORT Notifications!
>
> Citizens who were signed up on the previous system must register anew with SORT. This registration process is simple and can be done by agreeing to the "Conditions of Use" at the bottom of this page. On the next page, enter the code that appears on the page and click on "Continue". On the next page, click on the "Community Notifications" link. Enter all of the information under the "Register for Community Notifications" section " and agree to the "Agreement Terms[.]"

It is important to make a comment that is not made clear by the preceding text. The Sex Offender Registry Tool (SORT) is a system offered to jurisdictions at no cost. States essentially wire into the system and, when it comes to creating their public-facing websites,

can choose from six templates or create their own design. Part of the reason that South Carolina was chosen for this case study is because it is both a well-resourced, highly-operative website and because it uses tools provided by the federal government. Many jurisdictional registry websites, especially tribal websites, use some form of federally-provided template. A case study on a site that was free of such influence is not meant to be representative of all sites. The SC registry is unique in how much intention is explicit in its design, and yet typical in its adoption of federal design tools.

Conditions of Use. One notable feature of the SC registry is its Conditions of Use section, which sits below the welcome message on the landing page. It is both extensive, has unique formatting features, and unique protections. Here is the full text:

> The County Sheriff's Offices and the South Carolina Law Enforcement Division update this information regularly, to assure that it is as complete and accurate as possible. However, this information can change quickly and information on registered sex offenders is often provided by the registered sex offender themselves as required by law. This information may not have been verified by local law enforcement officials at the time it is posted on the website. You are cautioned that the information provided on this site is information of record and may not reflect the current residence, status, or other information regarding a registered sex offender.
>
> Individuals included within the Registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.
>
> [In the following paragraph, the word WARNING is bold and red]
>
> The following WARNING is posted pursuant to S.C. Code of Law §23-3-510:
>
> [The following paragraph, in its entirety, is bold and red]

A person who commits a criminal offense using information from the sex offender registry disclosed to him pursuant to Section 23-3-490, upon conviction, must be punished as follows:

(1) For a misdemeanor offense, the maximum fine prescribed by law for the offense may be increased by not more than one thousand dollars, and the maximum term of imprisonment prescribed by law for the offense may be increased by not more than six months.

(2) For a felony offense, the maximum term of imprisonment prescribed by law for the offense may be increased by not more than five years.

For further information on any registrant listed on this website or if you believe that any of the information found in these records is in error, please contact the South Carolina Law Enforcement Division, Sex Offender Registry at Post Office Box 21398, Columbia, SC 29210, Phone (803) 896-2601, Fax (803) 896-2311, or by e-mail at sor@sled.sc.gov

South Carolina Code of Laws mandate that the South Carolina Law Enforcement Division develop and maintain the sex offender registry. The intent of these laws are to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.

The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses.

To view a copy of the laws please go to S.C. Code of Laws Title 23, Chapter 3, Article 7, and Sections 400 through 555 using the following link: www.scstatehouse.gov

Information on this site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address and that any such action could result in civil or criminal penalties.

This Conditions of Use section is informative for several reasons. First, in comparison to dozens of other jurisdictions' registry websites, the posting of 'conditions of use' is a rarity. Many sites rely on 'disclaimers,' which are functionally the same – but communicate a very different stance. A disclaimer is generally something that denies liability or responsibility. In a sense, as opposed to a warning or a conditional statement, 'disclaimer,' especially when paired with a milquetoast acceptable use policy, implies a 'harass at your own risk,' attitude.

The fact that the SC registry not only uses a conditional format – i.e., 'Here are *your* responsibilities if you choose to engage with this website' – but is one of a few states that has a specific criminal law prohibiting use of the registry to harass or injure registrants and/or their associates is remarkable. This is a notably positive aspect of the SC registry that, for whatever faults will become apparent in other aspects of the website, deserves recognition. Still, it does fit into the general performative narrative that the SC registry very clearly exhibits: that police are 'on the job' and in control. By communicating severe warnings – in red and bold-faced letters – SLED flexes its authoritarian muscle textually and visually by putting both offenders and those who would abuse the information found in the registry on notice. This is further displayed by the second-person language – "You are cautioned" – when the site generally uses third-person language: a personalizing performance that reaches out and grabs the reader by the collar in breaking this third-person trend.

"The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses" is a sentence that is out of place in the context of such a warning. The inclusion of this statement is a clear performance – a direct political tool – stating and demonstrating the value of the registry as something beneficial and/or effective

without providing any clarifying statements. How will it help provide law enforcement with the tools needed in investigating criminal offensive? Is SLED tracking the use of the registry? This statement, beyond performance, raises more questions than it answers.

The Conditions of Use must be agreed upon before continuing to any page in the navigational menu. Selecting 'I do not agree' redirects to the statement, 'To Search for the offenders you have to agree to the conditions.' Clicking 'I agree' leads to a verification code (ex. a random array of letters and numbers to confirm that the user is human) which must be entered. This is positive from a design perspective because it ostensibly prevents website scraping, which is a tool that could be used by someone seeking to download identifying information *en masse.* This is an issue seen with other types of public records, such as mugshots: individuals' photographs get scraped from police websites and then posted on private sites – and can only be removed when the individual picture agrees to pay a large sum of money.[273]

Geographic Search. Unless otherwise selected via the navigational menu, a successful verification redirects to the Geographic Radius Search, which allows searches using combinations of Street, City, State, and Zip Code inputs to "search for sex offenders that live, work, or attend school within a 1-, 2-, or 3-mile radius of a specific address or within a specific zip code." This is fascinating because of the duality between information-sharing and depth of information. On the one hand, South Carolina certainly leans towards the less-private end of the information-sharing spectrum by allowing website users to search offenders living, working, and/or attending school nearby. Alternatively, the fact that the

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[273] *See* Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access,* 70 RUTGERS. U. L. REV. 557 (2018).

radius maximum is logically either the size of the zip code or three miles (whichever is larger) stands in slight contrast to many states' searches which can often (from the author's general experience researching these sites) extend to five miles. This would, like the verification process, suggest that the state is posturing towards providing a large amount of information about a narrowly-targeted group: a user can't see everyone in one fell swoop, nor can they scrape the site for data – but the records they find on their searches may be extensively detailed, a performance that communicates that these registrants are metaphorically (and perhaps physically) 'on their (police) radar.'These searches are also narrower in the options they do not communicate (which can be found on other such sites), including 'status' (such as 'registered,' 'non-registered,' 'sexual predator,' 'recidivist,' etc.), aliases, and options to include incarcerated offenders. Again, this omission communicates (through performance) that the state would prefer searches to be narrow but provide a wealth of information on those identified in these searches.

Results for an address search return on a Google Map embedded in the page, with icons for each. An icon of a house represents an offender's home, a skyscraper icon represents an offender's workplace, and a schoolhouse represents an offender's educational institution. Users can click on any of these icons and see offenders' names and addresses. The use of Google Maps to chart registrants may be significant, in that is represents a potential overlap between public and private surveillance – a partnership that itself is also a performance.

Below the map, in the case of either address-specific or general zip code searches, a counter lists 'Total offenders found' with a number of search results. Under a header, 'Offenders,' results are listed alphabetically using a table with four columns. The first is

'Picture,' which shows the most current photo of each offender. Underneath each photo is either the term 'Adult' or 'Juvenile' and 'Tier,' with the offender's corresponding tier number. This may be confusing for some users, as 'juvenile' in this instance does not refer to the victims, but refers to whether the offender was an adult or juvenile at the time of their conviction. In this way, the design flaw is partially caused by lengthy registration requirements: an image of an apparent middle-aged man with the term "Juvenile Tier II," for example, might easily be mistaken to imply that the middle-aged man has offended against a juvenile victim – a situation that can only arise in a system in which an offender who committed their offense as a minor is still required to register multiple decades later. Whereas law enforcement or other government actors would likely recognize the difference, it is unclear whether the distinction is considered by authorities to be important for other users of the site.

The next column is 'Name' followed by 'Aliases' and 'Matching Addresses.' Aliases play an important role in the performative nature of sex offender registries. Most often, exploring a sex offender registry website shows that aliases are likely to simply consist of very obvious variations of names: Joseph might have an alias of 'Joe' or 'Joey.' Still, the use of the term 'alias' may conjure an image of the '*aka*' associated by Hollywood with criminality (e.g., Joseph aka 'Bones'), and further suggests that these are individuals with something to hide. By portraying many offenders as having 'aliases,' the use of language here appears to be part of the overall narrative presented by SLED. This usage is by no means, however, unique to the SC registry and the 'aliases' category remains on many registry sites.

Profiles. Clicking on an offender's listing brings the user to their entry in the system. Their name is listed in bold, capitalized letters at the top of the page. On the left of the page is the offender's most recent photo with the date of that photo. Underneath this photo is a small gallery of past photos, each of which will expand when clicked. In the 'Main' tab, the registrant's name is listed, followed by aliases. Underneath this information is gender, race, ethnicity, and date of birth. Next, a primary address is listed. Physical description follows, listing height, weight, hair color, and eye color.

Underneath the identifying information, a beige/brown box lists 'Offenses,' which includes a conviction date, the state of each conviction, the statute, and the description of the offense. Clicking on this description links to a simple page with 'Offense Description' in dark red. A legal description of the offense is written out as it might appear in the statute. Most offenses appear to be listed very clearly, though some offenses are listed fully capitalized and without lines between paragraphs. The full capitalization makes the already-complex legalese difficult to read and comprehend in these instances. This appears to be a technical error, though, and the author will only be using the correctly-displaying offenses when analyzing the site as a whole.

To the right of the 'Main' tab is 'Other Addresses,' which includes employer addresses, school addresses, and second homes. 'Scars' is to the right of 'Other Addresses,' which lists scar types, locations, and descriptions. 'Marks,' to the right of 'Scars,' is structured similarly, as is 'Tattoos,' to the right of 'Marks.' The final tab is 'Vehicle Information,' which includes vehicle license plate numbers in full, make, model, and color, as well as any information on boats. The inclusion of 'Boat Information' is likely a regional feature.

On each tab, there is a box below the information that says, in black text, “If you believe the listed information is in error, you may contact us via the ‘Submit a Tip’ button above.” Below this line, capitalized and in red, it reads, “THE INFORMATION PROVIDED ON THIS SITE IS INTENDED FOR COMMUNITY SAFETY PURPOSES ONLY AND SHOULD NOT BE USED TO THREATEN, INTIMIDATE, OR HARASS. MISUSE OF THIS INFORMATION MAY RESULT IN CRIMINAL PROSECUTION.”

The ‘Submit a Tip’ notice refers to the top of the page, above the offender information. There are four buttons, each with a standard web icon beside it. ‘Return to Search Results,’ which takes users back to the list of offenders, ‘Back to Search Form,’ which takes users back to the ‘Geographic Search’ page, ‘Submit a Tip,’ and ‘Ask a Question.’ The ‘Submit a Tip’ option takes the user to a new page labeled ‘Offender Tip.’ At the top of this page the address, phone, and website of SLED is listed.

Underneath, bolded and in grey, it reads, “To provide information on this offender please fill out the form below and click *Submit*.” Beneath this notice is the name, photo, alias, and primary residence of the registrant, followed by an optional box to input a user’s e-mail address and a larger text box to input a tip. This appears to be somewhat uncommon among registry sites generally. The ‘Ask a Question’ section is similarly structured.

Name Search. The ‘Name Search’ page has inputs for first and last names. The search function after input is identical to the ‘Geographic Search’ page.

Community Notifications. The ‘Community Notifications’ page displays a notice in bolded grey text: “The Community Notification system is available so you can be notified by e-mail when a sex offender registers a home, work, or school address that is near an address of interest to you.” Underneath this notice, the page is split vertically into two halves: one

side to register for community notifications, and the other to remove one's registration for community notifications (the latter of which consists solely of an e-mail input box).

'Register for Community Notifications' contains inputs for e-mail address, location address, search type (modeled from the 'Geographic Search' page) and the 'Agreement terms.' Underneath the 'Agreement Terms' box is a check-box with the words 'I Agree.'

The 'Agreement Terms' are as follows:

> The community notification system endeavors to provide you with electronic mail ("e-mail") information notifying you of certain eligible incidents or events about registered sex offenders that may be living, working, or attending school in your community. The goal of this service is solely to provide you with enough information to allow you, through your own efforts, to be more alert regarding matters of interest to you affecting your community. You agree to use the information for the intended purpose of allowing you to increase the precautionary steps taken by you and your family only, and not to redistribute the information for any illegal or unauthorized purpose.
>
> You agree not to sell, license, modify, distribute, copy, reproduce, transmit, publicly display, publish, adapt, or edit the information you obtain from this Web site, except as expressly authorized. Notwithstanding the above, you may print or download the materials or content of this service for personal, non-commercial use, provided you keep intact all copyright and other proprietary notices. Systematic retrieval of data or other content from this service to create or compile, directly or indirectly, a collection, compilation, database, or directory without written permission from us is prohibited.
>
> Address information is based on available Geographic Information Systems (GIS) data and represents only approximate placements. Offenders are required to register their addresses with law enforcement; therefore, the system may not include offenders who have provided false information or are otherwise not in compliance with the applicable laws.
>
> By registering for community notifications, you understand that information you are providing will be stored in order to

> provide the notifications you request. The stored information is not personally identifiable and the least amount of information needed by us for system purposes will be stored. By registering, you consent to receive community notification e-mail messages from this system. You may opt-out at any time by removing the registrations you previously submitted.
>
> The information provided is directly related to efforts by law enforcement agencies in tracking offenders and is subject to change at any time based on false information provided by offenders that is discovered by law enforcement officials.
>
> If the e-mail address you provided becomes inaccessible, you must provide a new e-mail address to us in order to continue receiving this service. Notifications will not be mailed or otherwise delivered in the event of an inoperative e-mail address, and we take no responsibility to contact you regarding defects in your e-mail.

While most of these terms are fairly standard and do not directly tie into the theories outlined in this thesis, one portion does. "The information provided is directly related to efforts by law enforcement agencies in tracking offenders and is subject to change at any time based on false information provided by offenders that is discovered by law enforcement officials." In this one line, SLED arguably shows its hand, demonstrating all three theories outlined in this work. By stating that any error in the registry results from false information provided by offenders, SLED is saying three things. Performatively, the statement says that the police are above any and all error – despite multiple disclaimers throughout the terms, not once does it warn about administrative, technical, human, or other error by SLED. In fact, it ties labelling theory in by putting the future blame on the offenders – 'offenders,' not 'registrants' – and furthers moral panic and populist punitiveness by implying that the police are always hard at work to discover the lies being told by offenders.

Frequently-Asked Questions (FAQs). The FAQ page addresses eleven questions. Some are answered with legalese (including Latin-based legal terms like *nolo contendere*, and writ of *habeas corpus*) in massive blocks of single-spaced text with no indentions or other paragraph markings. The first question, for example, 'What is a Sexual Offender,' is 1,299 words with no spacing between any lines. These 'legal' answers are also littered with citations throughout and were difficult for the author – someone who has been studying these specific laws for almost two years – to understand. The following questions were answered in this style: 'What is a Sexual Offender,' 'Who is required to register,' 'I am a registered sex offender from another state and plan to visit South Carolina[] . . . Am I required to register,' 'Can a sex offender be removed from the registry,' 'What information is required in jurisdiction's sex offender registries,' 'What information must be available to the public through public websites,' and 'Can a registered sex offender live near a school?'

The remaining questions are answered with some legalese mixed in but are largely readily understandable and more succinct. The questions 'What is a Tier II offender,' and 'What is a Tier III offender' simply describe the categories of those tiers and list the requirements for each. What is extremely telling about these answers, however, is not in the use of language, but in the copying of it. The SC registry uses direct language taken from the federal guidelines described in Chapter Three – the guidelines that the author described as encouraging jurisdictions to apply stricter registration requirements in lieu of creating their own tiered categories. The question 'What is a Sexually Violent Predator,' a seemingly important definition due to the extreme language and the imagery it conjures, is not fully answered. Beyond giving the time requirements for how often this group of registrants must be photographed, etc., the only definition provided is "[a] person determined by a court to be

a sexually violent predator pursuant to state law[.]" The question 'Can sex offenders have a social media account' is answered quite succinctly (the answer being yes).

Resources. Underneath a clickable button to call the National Child Abuse Hotline, the 'Resources' page contains a series of links with between one and four links under each of the following categories: 'Adult Sexual Abuse and Family Violence Resources,' 'Legal / Investigation / Legislation / Advocacy,' 'Preventing and Responding to Child Abduction,' 'Preventing and Responding to Child Abuse Resources,' and 'Preventing and Responding to Computer Facilitated Crimes and Child Sexual Exploitation.' Most of the links provided are to non-profit or governmental organizations that are fairly standard and certainly appropriate, though there is no indication of how these sites/resources have been vetted. Are these resources intended to serve as extensions or proxies for the work done by law enforcement or, performatively, are they a demonstration that SLED works with reputable organizations? One link, under 'Preventing and Responding to Computer Facilitated Crimes and Child Sexual Exploitation,' directs to a non-profit called Enough is Enough,[274] which the Office for Intellectual Freedom of the American Library Association has called an "anti-porn evangelical" group.[275] All of the resources linked on the 'Resources' page are directed towards victims, parents of victims, and parents concerned about children.

Contact Us. The 'Contact Us' page looks very similar to the 'Ask a Question' and 'Submit a Tip' portions of the offender profiles, though they do not contain the information about any specific offender. There are input boxes for users' names, e-mails, and questions/feedback. There are no further links or pages on the SC registry.

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[274] *Enough Is Enough*, www.enough.org

[275] Brian M. Watson, *NCOSE's Dirty Dozen Censorship*, INTELLECTUAL FREEDOM BLOG (The Office for Intellectual Freedom of the American Library Association) (2019).

Chapter Seven will attempt to tie this analysis into the larger context and apply the theoretical base of this thesis to the SC registry.

CHAPTER SEVEN: DISCUSSION

Analysis

Origins. From the outset, the forced registration of people in the United States has come from a place of fear and bigotry. First, with Chinese exclusion – a dark time in our nation's history – which sought to utilize cheap labor while refusing the humanity of the laborers. It is truly unnerving to consider that the ubiquity of carrying photo ID may have originated as a ploy to apprehend individuals of Asian descent when they were not carrying their papers and deport them. Labeling and populist punitiveness are on full display during this period, with the labeling coming in paper form and the punitiveness resulting in abuses that would likely have horrified Americans were they to be inflicted upon most other groups of people.

Homophobia. This shameful history continued with registration in California first for gang activity and then the early sex offender registries. As discussed, these 'sex crimes' registries were largely a means to prosecute homosexual men, with a majority of arrests coming from consensual gay activity. In this regard, the labeling effect is quite clear: by grouping homosexuals with sexual predators – and grouping the resulting combination with criminal gangs, the respective governments created a class of undesirables – a group that could be seen as the collective font of social ills in the community while also communicating disgust and shame to those labeled as deviants. Further, these registries – being paper-based and without the adequate tracking technology to be very useful – were largely performative.

There is seemingly no rational way in which early registries would have been plausibly useful in addressing actual issues, beyond keeping a list of easy suspects already disliked by the community and law enforcement. This performance served the dual function of both informing the public that the police were addressing the moral panic they were experiencing (and their social anxiety about homosexuality) and communicated to the homosexual community that it, in no uncertain terms, was not welcome.

Modern Legislation. We continued to see populist punitiveness re-emerge in the 1990's during the overhaul of the sex offender registry system from a sparse patchwork of internal registries into the public-facing behemoth that it is today. Scoring political points by stoking the fears fueled by rare, but horrific instances – the gruesome murder of a child, for example – legislatures represented all sex offenders as a monolithic, equally-contemptable group not only through the legislative effects of their bills, but in the names of the bills themselves. The vast majority of notable laws involving sex offenders, both federal and state, have the names of children in them (Megan's Law, Jessica's Law, etc.), "which achieves an essential message about the law it represents."[276] The problem here is that "simple messages are also vulnerable to sweeping generalizations" and in this case, "the generalization is clear: each sex offender, no matter the conviction, is painted with the same broad brush as the violent sexual predator who killed Megan … [which] conjures up a host of malevolent images regarding sex offenders."[277] Further, the increase in laws – with names evoking horrific crimes – signaled to the public that crime was escalating.[278]

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[276] Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFFALO LAW REVIEW 1, 24-27 (2010).

[277] *Id*.

[278] *Id*. at 38.

Federal and State Law. The most performative aspects of sex offender registration policy would come in the form of SORNA and its accompanying federal guidelines. The majority of the regulations use language that is both aggressive in its policies and glibly dismissive of the rights of the individuals affected by them. Whether it is smirking 'scoreboard' style list of failed legal challenges to SORNA that the DOJ includes in its annual report, to the many instances of 'suggesting' ways that states 'may choose' to take the mandate to even more intrusive heights, it appears that the federal government wastes no opportunity in treating people's lives – and their rehabilitation – like a game rigged in its favor.

The analysis of the SC registry suggests that at least some states are following this line of encouragement, not only considering the guidelines, but utilizing them directly on the registry websites themselves. The SC registry, under both 'What is a Tier II offender,' and 'What is a Tier III offender' in its FAQ section, copies the exact verbiage used in the federal guidelines – in particular, the rationalization for broad, sweeping requirements to satisfy the federal mandate without needing to individualize offenders. The passage is as follows: "Rather, the SORNA requirements are met as long as sex offenders who satisfy the SORNA criteria for placement in a particular tier are consistently subject to at least the same minimum duration of registration, frequency of in-person appearances for verification, and extent of website disclosure that SORNA requires for that tier." In terms of the analysis, taking parts of the guidance verbatim and using them on its own site would appear to be evidence that the state found the guidelines' rationale to be compelling. However, it is important to note that many states – for an array of reasons – are not SORNA compliant. While they may rely on SORNA as a guiding principle, the actual number of states that are

fully in compliance with all (or even most) aspects of the law is very small. Despite this, the law's influence is pervasive – and still sets the standard for many state laws.

Challenges. Legal challenges to SORNA and SORNA-adjacent laws reveal two key points. First, challenges to state SORNA-adjacent laws, such as residency restrictions, monitoring, exclusion, etc., reveal the level of overreach that the states have attempted – which can be viewed through the lens of populist punitiveness and police performance. The populist punitiveness, of course, is on display with the (since-challenged) egregious restrictions put upon juvenile offenders in many states. If a state, in good faith, is ready to enroll a child in lifetime registration and potentially monitoring – especially when there is little to no evidence as to the efficacy of such enrollment – there is clearly some aspect of moral righteousness and fear. As to performative policing, these moves – when unchallenged – perform a message of invulnerability and strength on the part of law enforcement. Voting against these laws – or ruling against them as a judge – can also be seen as soft on crime, and the performative value of standing up for the rights of sex offenders is not very popular in American politics. Secondly, these challenges offer a potential path forward for sex offender registry reform, which will be discussed in the conclusion.

Fourth Amendment Issues. On the issue of registry law itself, the author admittedly began this thesis with the belief that there might be more to discover in this area. Unfortunately, there have been very few registry-specific claims made, addressed, or even remarked-upon in the judicial space. The recent ruling – which rejected such an argument on its face, flatly stating that registration is not a Fourth Amendment violation – is evidence that registry-specific claims are unlikely to succeed on Fourth Amendment grounds.

On the issue of registry-adjacent law, however – particularly SBM – there is much abuzz. The cases reveal compelling evidence of performative policing and populist punitiveness. For example, ankle monitors used in SBM are clearly performative aspects of policing. Similar to a perp walk or mug shot, "the traditional ankle monitor is an archetypal display of criminality. It is sufficiently entwined into the American cultural consciousness, being regularly referenced in popular culture and satirized in social media, as to be easily recognized by most members of the public."[279] By conjuring this image through performative policing, law enforcement creates a dichotomy in which the archetypal criminal is 'bad,' which necessitates the jailer as 'good.'[280] Further, the visuality of the monitor – and perhaps why this aspect of the technology has unnecessarily remained unchanged – enables it to "operate as a stigma symbol that casts the wearer as 'a criminal' in the eyes of the public and makes them vulnerable to prejudicial treatment."[281] Much like the term 'sex offender,' which can be imprecise, "there is no visual differentiation among what types of monitors are used for different types of wearers." This lack of clarity casts wearers as simply "subjects worthy of surveillance in the eyes of the public." In this way, "wearing an electronic ankle monitor is viscerally akin to being made to wear a criminal record on one's body."[282]

The South Carolina Registry. Just as performative policing in deeply involved in the use of ankle monitors, the registry website itself – at least the one studied in this work – provides another opportunity to see police performance in action. The professional design of the site belies many performative aspects, such as professionalism and organization. The conditions on the landing page, as discussed, further this performance. There are some key

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links that can be made between the theories studied and the site itself. First, it is - like most registry sites - akin to looking at a "Most Wanted" bulletin. Despite the rational fact that everyone on the site is accounted for, there is a very real, creeping sensation that one is looking at some sort of fugitive database – that these are dangerous people 'to watch for.'. This appears to be by design: the photos are not mugshots (which we might associate with 'capture' or 'incarceration,' but are instead simply recent, unsmiling photos. The sea of expressionless faces further communicates (potentially inaccurate) subtleties about the community of sex offenders. Additionally, the 'marks and scars' aspect of the site seems intended more for a fugitive hunt – with the traditional reason for this information being provided in order to recognize someone on the run (e.g., 'Be on the lookout for a man with a rectangular scar on his left thigh'). The 'Submit a Tip' function also orients the registry as some sort of fugitive watch: soliciting 'tips' heavily implies that there is some key information that is unknown to the police - in particular because it may be falsified or withheld by the offender. This point is built up in writing later, as discussed, in the disclaimer – which blames all inaccurate data on 'false information' provided by offenders. The 'Submit a Tip' function also implies a contract or partnership between the public and the police – you help us and we'll help you: we're in this together.

One notable point is on the 'Resources' page, where the organizations listed are intended for use by victims. This communicates that resources offered for direct services to offenders, which might address similar needs, such as mental health care. This performs the value that offenders – even on the site that lists their most private information – are not worthy of rehabilitation. The performance, this way, is that of caretaker: valued community members are directed to services; offenders are registered and restricted. In terms of labeling,

the registry site continually uses some combination of red, boldfaced, and uppercase text to mark offenders – using the actual term 'offenders' repeatedly throughout.

The relationship between the politicians and law enforcement agencies, which rely on each other for legitimacy and mutual performative power, utilizes the sex offender registry as part of an almost formulaic performance of 'order, chaos, and order restored' – signaling that 'we are in control, there was a moment of disarray and danger, but we have retaken control and dealt with the chaos.'

The Path Forward

So where do we go from here? It is clear that a history of bigotry, political fear-mongering, and law enforcement performance continues to drive the expansion of registration schemes. It is also clear that the federal government wields (and enjoys wielding) the most influence in this process. The author suggests that state courts asserting their autonomy against increasingly punitive federal sex offender laws may be one path in the direction of meaningful reform. As the federal government continues to expand these laws – and they inevitably collide with the state constitutions – we may see a growing trend of states standing up to SORNA regulations as against the interests of their states. This may well lead to further federal challenges. As it stands, there is not much of a path forward for ex post facto claims, as Smith makes this exceedingly difficult to overcome. Public opinion is unlikely to change – especially as neither states nor the federal government make much effort to justify regulations on the basis of efficacy. This area – particularly textual analysis on registry sites and study on their function as law enforcement media tools – deserves further research. Nearly a million people around the country are registered sex offenders – yet there

are very few people willing to advocate publicly for their constitutional rights and a chance at rehabilitation.

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